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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Number _____

AETNA LIFE INSURANCE COMPANY,

Petitioner

v.

DON E. LESTER, JR.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Aetna Life Insurance Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on October 28, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 28, is reported in 295 F. Supp. 1208. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 48, is reported in 433 F. 2d. 884.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1970.[1] Rehearing was denied on December 11, 1970.[2] Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory provision of the state of Louisiana, requiring notice as a condition of forfeiture for nonpayment of premiums, is applicable to a policy of life insurance executed and delivered in the state of Wisconsin to a citizen of Wisconsin, there being no notice requirement in Wisconsin.

2. Whether application of the Louisiana notice statute to a Wisconsin policy of life insurance would impair the obligations of the contract, deprive petitioner of property without due process of law, deny equal protection of the laws and fail to give full faith and credit to the statutes and jurisprudence of Wisconsin, contrary to the Constitution of the United States.

3. Whether a Federal Court in a diversity case brought in Louisiana on a Wisconsin life insurance contract is bound

1. Appendix B, *infra*. p. 66.
2. Appendix B, *infra*. p. 64.

by Louisiana substantive law or is free to apply the "false conflicts" theory from "other jurisdictions".

4. Alternatively, whether petitioner complied with the requirements of the Louisiana notice statute.

STATUTES INVOLVED

The statutory provisions involved are Article 10 of the Louisiana Civil Code and R. S. 22:177 of the Louisiana Statutes Annotated. They are printed in Appendix A, *infra.* pp. 26-27.

STATEMENT

The controlling facts were stipulated and are set forth with minor modifications in the opinions of the District Court and Court of Appeals.

On May 1, 1952, a life insurance policy for the face amount of $50,000.00 was issued in Wilwaukee, Wisconsin, by petitioner's[3] Wisconsin agent to Don E. Lester, Sr., who was a resident and citizen of Wisconsin. With his application, Lester, Sr. paid his first yearly premium of $2,252.50 and the policy was delivered to him in Wisconsin.[4] Under the terms of the policy, yearly premiums in the same amount were due May 1 of each year thereafter, subject to a thirty-one day grace period.

3. Petitioner, Aetna Life Insurance Company, is an insurance corporation domiciled in Hartford, Connecticut, doing business in Wisconsin and Louisiana.

4. Upon this record, the conclusion is "inevitable" that the policy is a Wisconsin contract and governed by the laws of Wisconsin. *Equitable Life Assurance Society v. Pettus,* 140 U. S. 226, 35 L. Ed. 497, 11 S. Ct. 822.

Clause 4 of the policy provided:

> "All premiums shall be paid in advance at the Home Office of the Company, or to its authorized agent, in exchange for a receipt signed by its Secretary or Assistant Secretary and countersigned by the agent. *If any such premium is not paid when due, this policy shall cease* * * *". (Emphasis supplied).

Lester, Sr. timely paid his yearly premiums from his Wisconsin residence until 1957. At that time he moved to Louisiana where he lived until his death on February 2, 1963. After moving to Louisiana, Lester, Sr. paid premiums on the policy as they became due from 1957 through 1961. On December 22, 1960, he changed the beneficiary of the policy to the administrator of his estate. On August 2, 1961, he obtained a policy loan of $12,398.84 secured by the cash surrender value of the policy. On October 27, 1961, he again changed beneficiaries, this time naming the respondent, Don E. Lester, Jr., sole beneficiary.[5]

On May 1, 1962, the yearly premium became due. A notice was issued to Lester, Sr., indicating that on the premium due date of May 1, 1962, he would owe the yearly premium of $2,252.50 and $451.18 in interest due on the loan.[6] Lester, Sr. did not pay the premium or interest on May 1, 1962, or within the thirty-one day grace period.

On July 2, 1962, thirty-one additional days after expiration of the grace period, Aetna advised Lester, Sr. that

5. The premiums were paid and changes of beneficiary and loan were handled through applicant's Wisconsin agents.
6. The notice sent to Lester, Sr. is reproduced in the opinion of the District Court, Appendix B, *infra.* p. 44. Aetna's business records show that this notice was mailed on April 13, 1962.

his policy had lapsed for non-payment of premiums,[7] but that he could apply for reinstatement. On July 6, 1962, Lester, Sr. applied for reinstatement and forwarded his check for $2,703.68, representing the yearly premium and loan interest, together with a note, reading: "Sorry, but Notice was misplaced. Please notify me if you reinstate". However, he failed to submit a physician's statement, including details of any cardiovascular findings. On August 8, 1962, Lester, Sr. was advised that his application for reinstatement could receive no further consideration until the physician's statement was submitted. Having received no response to its request for the physician's statement, on January 23, 1963, Aetna returned Lester, Sr.'s. check for $2,703.68. On February 2, 1963, the insured died.

This case was originally filed in the state courts of Louisiana by respondent, Don E. Lester, Jr., to recover the proceeds of the policy. The case was timely removed under Title 28, U. S. C. Section 1441, et seq. to the District Court below which took diversity jurisdiction pursuant to Title 28, U. S. C. Section 1332. The defendant, Aetna, denied any liability on the ground that the policy had lapsed for non-payment of premiums. The plaintiff's contention that Aetna

7. The provisions of the policy concerning extended term insurance and the automatic policy loan provisions are not applicable to this case. The policy loan indebtedness totaled $12,850.02, comprised of principal in the amount of $12,398.84, and interest due of $451.18. The cash surrender value of the policy on May 1, 1962, was precisely $12,850.00. The two cents deficiency prevented the automatic policy loan provisions from taking effect. Also, there was no cash value available to secure extended term insurance because of the two cent excess of indebtedness over cash value.

8. Louisiana Statutes Annotated, R. S. 22:177, Appendix A, *infra.* pp. 26-27.

had not properly complied with the requirements of the Louisiana notice statute[8] was denied by Aetna, which contended that no notice was required under the Wisconsin law and, alternatively, that the requirements of the Louisiana notice statute were fully complied with.

The District Court recognized that under Article 10 of the Louisiana Civil Code[9] federal and state courts of Louisiana had evolved a general conflicts rule that the law of the "place where the insurance policy is delivered" must govern. However, the District Court declined to apply this rule saying that the circumstances of the case required a more sophisticated and modern approach. The lower court noted a modern trend in other jurisdictions toward the "center of gravity" or "grouping of contacts" rule. It noted several decisions from the Louisiana Courts of Appeal discussing the modern trend and reasoned that the Louisiana Supreme Court would modify or reverse its previous "place of delivery" position. Judgment for $34,897.48[10] with interest and costs was entered and Aetna appealed.

Following the decision of the District Court in this case, the Louisiana Supreme Court decided the case of *Johnson v. St. Paul Mercury Insurance Company*, 256 La. 289, 236 So. 2d 216.[11] It clearly and emphatically denounced the use of the "center of gravity", "grouping of contacts" or "balancing of interests" doctrines in Louisiana, and held that the modern

9. Appendix A, *infra*. p. 26.
10. The face amount of the policy less the amount of an unpaid policy loan and interest, and less the amount of the unpaid premium.
11. Decided March 30, 1970, rehearing denied May 4, 1970. Copied for the convenience of the Court in Appendix C, *infra* pp. 68-92.

trends did not lend themselves to a firm declaration of law. It held that Louisiana would not abandon the *lex locus delicti* and *les locus contractus* approach.

The Court of Appeals below specifically referred to the recent decision of the Louisiana Supreme Court in *Johnson v. St. Paul Mercury Insurance Company, supra*, and concluded that the District Court had guessed wrong.[12] It set forth the applicable Wisconsin law as follows:[13]

> "The Wisconsin law contained no premium notice statute. *Under it, therefore, the policy would have legally lapsed.* (Emphasis supplied)

It also set forth the applicable Louisiana law, as follows:[14]

> "We are not convinced that the Louisiana Supreme Court would deviate from the 'place of delivery' rule to avoid a harsh result in an individual case. * * *We are presuaded that if the Louisiana Supreme Court were faced with the case at bar, they would likewise apply the lex loci contractus rule notwithstanding the harsh consequences to the appellee* (Respondent) * * *" (Emphasis supplied).

Accordingly, in this Louisiana diversity case, the Court of Appeals below specifically decided that under the laws of *both* Wisconsin and Louisiana the policy legally lapsed for non-payment of premiums. However, it affirmed the judgment in favor of respondent by applying the "false conflicts" doc-

12. The Court of Appeals said: "Speculation as to what the Louisiana Supreme Court would do with the choice of law issue is at an end. That court has spoken, and in speaking, has extinguished the theorizing of the trial court." Appendix B, *infra*. p. 57.
13. Appendix B, *infra*. p. 54.
14. Appendix B, *infra*. p. 58.

trine from "other jurisdictions", despite the recent decision of the Louisiana Supreme Court pronouncing a choice of laws rule to the contrary. The courts below referred to the rule in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, and *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 55 S. Ct. 817, and held that federal courts in diversity cases are bound by the substantive law of the state in which they sit. However, the Court of Appeals did not consider itself bound by the rule and apparently decided that "false conflict" diversity cases are excepted therefrom.

REASONS FOR GRANTING THE WRIT

1. On the basic issue of the applicability of the Louisiana notice statute to the Wisconsin insurance policy involved in the instant case, the decisions of the courts below are in direct conflict with the decisions of this Court in *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. Ed. 181, 21 S. Ct. 106; *Mutual Life Ins. Co. v. Dingley*, 184 U. S. 695, 46 L. Ed. 763, 22 S. Ct. 937, and *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 48 L. Ed. 788, 24 S. Ct. 538.

In *Mutual Life Ins. Co. v. Cohen*, supra, this Court held as follows:

> "The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the state of Montana. Under these circumstances, under the general rule, the contract was a Montana contract, and governed by the law of that state. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 232, *sub nom. Equitable Life Assur. Soc. v. Pettus*, 35 L. Ed. 497, 500, 11 Sup. Ct. Rep. 822.

In that state, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

"New York, on the other hand, the state by which the insurance company was chartered and in which it had its principal office, by Sec. 1 of chapter 321 of 1877 had enacted —

" 'Sec. 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided.' "

"The provision referred to, and which is stated at length in the succeeding part of the section, is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S. 330, 44 L. Ed. 1089, 20 Sup. Ct. Rep. 906.

"This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover.

"The question therefore is whether the law of New York controls.

* * * *

"We conclude, therefore, that the statute of the state of New York does not, under the circumstances presented, control, and that the rights of the parties are measured alone by the terms of the contract."

In *Mutual Life Ins. Co. v. Dingley,* supra, and *Mutual Life Ins. Co. v. Hill,* supra, this Court held that the New York notice statute could not be applied to policies of life insurance issue and delivered in the state of Washington which had lapsed for non-payment of premiums. This Court held that

the New York notice statute could not be given extraterritorial effect to impair the obligations of contracts validly consummated elsewhere.

In the instant case the life insurance policy was issued by a Connecticut insurer and delivered to Lester, Sr. in Wisconsin where the first premium was paid. Lester, Sr. was a resident and citizen of Wisconsin and continued paying his premiums on the policy from his Wisconsin residence for five years. The policy was a Wisconsin contract, governed by the laws of Wisconsin. Although Lester, Sr. moved to Louisiana, changed the beneficiaries on the policy twice and obtained a substantial loan, those steps were taken in compliance with the provisions of the contract and there was no modification or alteration therein.[15] Louisiana's connection with the contract

15. In *New York Life Insurance Company v. Head*, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879, this Court held that a polic, of life insurance issued by a New York insurer and delivered in Missouri to a resident of New Mexico was a Missouri contract, governed by the laws of the state of Missouri. Although the insured changed the beneficiaries twice and obtained a loan on the policy, this Court held that the laws of Missouri governed.

In *Griffin v. McCoach*, 313 U. S. 498, 85 L. Ed. 1481, 61 S. Ct. 1023, this Court held that the conversion of a term policy into a full life policy did not constitute a new contract and did not result in changing the law applicable to the policy.

In *Aetna Life Insurance Company v. Duncan*, 266 U. S. 289, 69 L. Ed. 342, 45 S. Ct. 129, a life insurance policy was delivered to the insured in Tennessee and a converted policy was subsequently issued after the insured had moved to Texas. This Court held, as a matter of constitutional law, that the converted policy must be treated as a Tennessee contract, and not as a Texas contract. The changes were specifically accorded by, and enforceable in virtue of, the original contract.

In *Williams v. McFerrin*, 242 F. 2d 53, a diversity suit brought in the federal courts in Louisiana, the Court of Appeals below held that Indiana law would have to be applied to determine rights under life insurance policies delivered in Indiana despite the fact that beneficiaries were changed twice.

was slight. The Court of Appeals below held that Wisconsin has no notice statute and that under the laws of Wisconsin the policy "legally lapsed" for non-payment of premiums. The court erred in concluding that the Louisiana notice statute could be applied to breathe life into the lapsed Wisconsin policy.

The Louisiana notice statute was copied from the New York notice statute.[16] Accordingly, the decision of the court below is in direct conflict with the decisions of this Court in the *Mutual Life Ins. Co. of New York v. Cohen, Dingley,* and *Hill* cases, *supra.*

The decisions of the courts below in the instant case are believed to conflict with other decisions of this Court involving insurance policy provisions requiring notice. In *Boseman v. Connecticut General Life Insurance Company,* 301 U. S. 196, 81 L. Ed. 1036, 57 S. Ct. 686, this Court held:

> "But the precise issue for decision is whether, as between petitioner and insurer, the policy provision requiring *notice* of claim is governed by Pennsylvania law or Texas law. * * *
>
> "The conclusion that Pennsylvania law governs the policy provision requiring notice of claim is supported not only by the *making and delivery of the contract of insurance in that state,* the declaration in the policy that Pennsylvania law shall govern and petitioners' acceptance of the insurance according to the terms of the policy but also *by the purpose of the parties to the contract that everywhere it shall have the same meaning*

16. In *Compton v. Amicable Ins. Co. of Waco, Texas,* 182 La. 991, 162 So. 751, 755, the Louisiana Supreme Court held that the Louisiana notice statute is a copy "almost verbatim" of the New York notice statute.

and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided." (Emphasis supplied)[17]

In *Hartford Accident & Indemnity Company v. Delta & Pine Land Company*, 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634, a policy of insurance was issued and delivered in the state of Tennessee. The policy provided that any claim thereunder must be made within fifteen months. This condition was valid in Tennessee but was in violation of statutes of Mississippi where the loss occurred. In upholding the insurer's defense under the provisions of Tennessee law, this Court held:

"The contract being a Tennessee contract and lawful in the state, could Mississippi without deprivation of due process, enlarge the appellant's obligation by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co. v. Dick*, supra, page 408, of 281 U. S., 50 S. Ct. 338, 74 L. Ed. 926), *it may not, on grounds of policy ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made.*" (Emphasis supplied).[18]

17. The interests of Pennsylvania appear similar to the interests of Wisconsin in the insurance policy involved in the instant case.

18. In the instant case, performance at most involved only the casual payment of money in Louisiana. Louisiana's connection with the Wisconsin life insurance policy was slight.

The Louisiana Civil Code provides simply that written instruments are governed by the laws of the places where they are passed or executed.[19] The Louisiana Supreme Court has repeatedly interpreted this statutory provision to mean that the law of the "place where the insurance policy is delivered" must govern.[20] In prior cases, the Court of Appeals below has recognized and followed the Louisiana "place of delivery" rule.[21] In the instant case, the decision of the court below specifically referred to the Louisiana statutory provision, decisions of the Louisiana Supreme Court and its own prior decisions but classified the "place of delivery" rule as too rigid. Its decision that this case is not governed by the laws of Wisconsin, where the policy was delivered, is in direct conflict with its own decisions and the decisions of the Louisiana Supreme Court.

2. Clearly the questions presented are of great importance to the insurance industry. The provisions of a life insurance policy concerning payment of premiums are the very essence of the contract. In *Thompson v. Knickerbocker Life Insurance Company*, 104 U. S. 252, 258, 26 L. Ed. 765, this Court said that prompt payment of premiums is the "life and soul of life insurance business".

In *Bergholm v. Peoria Life Insurance Company*, 284

19. Article 10, Louisiana Civil Code, Appendix A, *infra*. p. 26.

20. *City of Shreveport v. New York Life Ins. Co.*, 141 La. 360, 75 So. 80; *City of Lake Charles v. Equitable Life Assur. Soc.*, 114 La. 836, 38 So. 578; *Harmon v. Lumbermen's Mutual Ins. Co.* (La. App.), 184 So. 2d 397, 401; *Theye Y Ajuria v. Pan American Life Ins. Co.*, 245 La. 755, 161 So. 2d 70; and cases cited therein.

21. *Davis v. Insurance Company of North America*, 268 F. Supp. 496, aff. 398 F. 2d 418; *Williams v. McFerrin*, 242 F. 2d 53.

U. S. 489, 492, 76 L. Ed. 416, 419, 52 S. Ct. 230, this Court held:

> "As long ago pointed out by this court, the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of *the very essence and substance of the contract*, against which even a court of equity cannot grant relief. *Klein v. New York L. Ins. Co.*, 104 U. S. 88, 91, 26 L. Ed. 662, 663; *New York L. Ins. Co. v. Statham*, 93 U. S. 24, 30, 31, 23 L. Ed. 789, 791, 19 Am. Rep. 512; *Pilot L. Ins. Co. v. Owen* (C. C. A. 4th), 81 F. (2d) 862, 866. And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long settled principles." (Emphasis supplied).

In *Mutual Life Insurance Company of New York v. Hill*, supra, this Court said:[22]

> "Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defenses to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid."

The instant case involves the validity of provisions governing payment of premiums in a life insurance policy which, it is conceded, was made outside and beyond the jurisdiction of the state of Louisiana. The policy was issued by a Connecticut insurer to a citizen of Wisconsin. The policy was delivered to the insured in Milwaukee, Wisconsin. The con-

22. 193 U. S. at page 559.

tracting parties specifically agreed that if any premium was not paid when due, or within a thirty-one day grace period, the policy would lapse. This agreement was valid and enforceable in Wisconsin. The insured failed to pay the premium on the due date or within thirty-one days thereafter and the policy lapsed. The Court of Appeals below specifically held that under the laws of Wisconsin, the policy "legally lapsed". That should end the matter. However, the Court of Appeals below reached a different conclusion thereby raising serious questions of constitutional law. It held that Wisconsin has no notice statute but that recovery could be had under the policy because the Louisiana notice statute[23] had not been fully complied with by petitioner.

Application of the Louisiana notice statute of abrogate the premium-paying provisions of the insurance policy here involved, which provisions were valid and binding in Wisconsin where the contract was made and delivered, impairs the obligations of the contract, fails to give full faith and credit to the statutes and jurisprudence of Wisconsin, denies equal protection of the laws, and deprives petitioner of property without due process of law, contrary to the Constitution of the United States. *Hartford Accident & Indemnity Company v. Delta & Pine Land Company*, supra; *Boseman v. Connecticut General Life Insurance Company*, supra; *New York Life Insurance Company v. Head*, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879; *Aetna Life Insurance Company v. Dunken*, 266 U. S. 389, 69 L. Ed. 342, 45 S. Ct. 129; *Home Insurance Company v. Dick*,

23. R. S. 22:177, Louisiana Statutes Annotated, Appendix A, *infra*. p. 26.

281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338, and *Lauritzen v. Larsen*, 345 U. S. 571, 97 L. Ed. 1254, 73 S. Ct. 921.

In *New York Life Insurance Company v. Head*, supra, this Court held:[24]

> "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the State of New York, and there destroy freedom of contract without drawing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends."

In *Aetna Life Insurance Company v. Dunken*, supra, this Court held that state statutes relating to insurance do not affect the validity of a policy issued by the insurer in another state.

In *Hartford Accident & Indemnity Company v. Delta & Pine Land Company*, supra, this Court held:

> "The Mississippi statutes, so construed, deprived the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory. (*Hooper v. California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 197; *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 565, 566, 19 S. Ct. 281, 43 L. Ed. 552; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 398-399, 20 S. Ct. 962, 44 L. Ed. 1117); *but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.* 34 S. Ct. 879, 58 L. Ed. 1259; (*New York Life Ins. Co. v. Head*, 234 U. S. 149; *Aetna Life Ins. Co. v. Dunken*, 266 U. S.

24. 234 U. S. at page 161.

389, 399, 45 S. Ct. 129, 69 L. Ed. 342). *Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.* Home Insurance Co. v. Dick, 281 U. S. 397, 407-408, 30 S. Ct. 338, 74 L. Ed. 926.

* * *

"*A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.* (Emphasis supplied).

Louisiana's adherence to the "place of delivery" rule is based not only upon its own statutes and jurisprudence, but upon strong constitutional grounds.[25] In *Johnson v. St. Paul Mercury Ins. Co., supra,* the Louisiana Supreme Court, in refusing to adopt the modern trend toward "grouping of contacts", "center of gravity" and "balancing of interests", recently said:[26]

"In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out of state event. *Pearson v. Northeast Airlines, Inc.*, 309 F. 2d 553, at 563 (2d Cir. 1962).

25. It is also well settled that a state cannot regulate or invalidate provisions in an insurance contract validly made outside her borders. *Allgeyer v. State of Louisiana,* 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; *St. Louis Cotton Compress Co. v. Arkansas,* 260 U. S. 346, 67 L. Ed. 297, 43 S. Ct. 125; *Connecticut Gen. Life Ins. Co. v. Johnson,* 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 and *Prudential Ins. Co. v. Benjamin,* 328 U. S. 408, 90 L. Ed. 1342, 66 S. Ct. 1142.

26. *Johnson v. St. Paul Mercury Ins. Co.*, Appendix C, *infra.* pp. 80 to 81.

"And the Full Faith and Credit Clause places a restraint upon this proposed judicial law making, which, when considered with the concept of comity between states as intimately associated as Louisiana and Arkansas, makes us pause and hesitate to embrace this somewhat fashionable but freewheeling tendency.

* * *

"Adoption of the contact doctrines with their attendant built-in inclination to favor the plaintiff, combined with the known fact that plaintiff selects the forum, the assumption is all too clear that plaintiff will select the forum which benefits his claim, as in the case at bar. This places the defendant in an unequal position in the eyes of the law denying him the equal protection of the law."

3. On the choice-of-laws issue, the decision of the Court of Appeals below appears in direct conflict with the decisions of this Court in *Klaxon Co. v. Stentor Electric Mfg. Co., supra; Erie R. Co. v. Tompkins, supra,* and their progeny, wherein this Court has repeatedly held that a federal court in a diversity case is bound by the substantive law of the state in which it sits, including its choice-of-law rules,[27] its statutes and decisions.[28] A federal court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it

27. The extent to which a state shall apply in its own courts a rule of law of another state is itself a question of local law of the forum. *Finney v. Guy,* 189 U. S. 335, 47 L. Ed. 839, 23 S. Ct. 558; *Klaxon Co. v. Stentor Electric Mfg. Co., supra.,* and *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 88 L. Ed. 149, 64 S. Ct. 208.

In diversity cases, federal courts must follow choice-of-law rules prevailing in the states in which they sit. *Van Dusen v. Barrack,* 376 U. S. 612, 11 L. Ed. 2d 945, 84 S. Ct. 805.

28. The law of a state is embodied as well in its common-law rules as in its statutes. *Erie R. Co. v. Tompkins, supra, Magnolia Petroleum Co. v. Hunt, supra.*

were only another court of the state in which it sits.[29]

In the instant case, the Court of Appeals below specifically referred to the foregoing "well established principles" and stated that it was required to divine what law the Louisiana Supreme Court would apply. It held that the Louisiana Supreme Court had refused to deviate from the "place of delivery" rule and that if the Louisiana Supreme Court were faced with the case at bar, it would apply the *lex locus contractus* or "place of delivery" rule. After ascertaining the controlling Louisiana state law, the Court of Appeals set out on a course of deciding what Louisiana law *ought to be*. Application of the Louisiana notice statute to the Wisconsin policy in the instant case apparently followed from the court's determination of the "better view" without regard to either Wisconsin or Louisiana law. It turned to what is called the "false conflicts" rule in "other jurisdictions". By discussing and enforcing an independent "general law" of conflict of laws, the Court of Appeals in the instant case came in direct conflict with the holding of this Court in *Klaxon Co. v. Stentor Electric Mfg. Co., supra*, as follows:

> "Application of the New York statute apparently *followed from the court's independent determination of the 'better view' without regard to Delaware law*, for no Delaware decision or statute was cited or discussed.
>
> "We are of opinion that the prohibition declared in *Erie R. Co. v. Tompkins*, 304 US 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 ALR 1487, against such independent

29. *Guaranty Trust Co. v. York*, 326 U. S. 99, 108, 89 L. Ed. 2079, 2086, 65 S. Ct. 1464; *Holmberg v. Armbrecht*, 327 U. S. 392, 394, 90 L. Ed. 743, 746, 66 S. Ct. 582, and *Bangston Bondholders Protective Committee v. Green*, 329 U. S. 156, 162, 91 L. Ed. 163, 166, 67 S. Ct. 237.

determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. See *Erie R. Co. v. Tompkins, supra,* at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. *It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.*

"Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. M. E. White Co.*, 296 US 268, 272, 80 L. Ed. 220, 225, 56 S. Ct. 229. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.*, 290 US 163, 78 L. Ed. 243, 54 S. Ct. 134. *And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.*" (Emphasis supplied).

The "false conflicts" theory was obtained primarily from the District of Columbia Circuit which applied a "balancing of interests" to obtain a choice-of-laws rule.[30] Under it,

30. *Gaither v. Myers,* 131 US. App. D. C. 216, 404 F. 2d 216; *Williams v. Rawlings Truck Line, Inc.,* 123 US. App. D. C. 121, 357 F. 2d 581. But see *Mills v. United States* (D. C., D. C. 1969), 297 F. Supp. 972.

cases are apparently decided in accordance with the law of the jurisdiction that has a majority of contacts and the greatest interest in the case irrespective of where the insurance policy was made or delivered.[31]

In the instant case, the courts below erroneously decided that there were "significant" contacts in Louisiana because the insured merely changed his beneficiaries twice and obtained a loan on the policy. These steps were taken in compliance with policy provisions, there was no modification or alteration therein, and Louisiana's connection with the insurance contract was slight.[32]

The proponents of the "false conflicts" theory apparently advocate an independent federal rule of conflict of laws in diversity cases. An independent "general law" of conflict

31. The danger of finding a "spurious conflict" by a court considering the "better law" has been noted. 29 ALR 3d 629, fn. 3. Weintraub, in 48 Cornell LQ, 215, states: "This is not to suggest that a pscudo-conflicts analysis should be used to avoid a poor local rule when in fact that is no true conflict, when no other state has a legitimate interest in having its own more modern rule applied. *The temptation to use the conflicts device for this purpose may be strong, but the only intellectually honest solution is a direct changing of the poor local rule.*"

Professor Leflar has warned: *"When an event or transaction has contracts with two or more states whose laws are different, and each state's contacts are sufficient under the Federal Constitution to permit its law to be applied, a real (not a false) choice-of-law problem is presented." Leflar, American Conflicts Law (1968), 237, 238*

The limitations in applying the modern theories in federal diversity cases involving life insurance are set forth in a recent article entitled "Choice-of-Law in Life Insurance Litigation", *The Forum*, Vol. VI, No. 1, pp. 1-11, published by the Section of Insurance, Negligence and Compensation Law of the American Bar Association (October, 1970).

32. Footnotes 15 and 18, *supra*.

of laws was specifically rejected by this Court in *Klaxon Co. v. Stentor Electric Mfg. Co., supra.* However, reaffirmation of the principle of this Court at the present time is plainly in the public interest, since the "false conflicts" approach in the instant case is likely to be presented in almost every diversity case involving claims under life insurance policies, including many hundreds now pending. Dual or multiple regulations of insurance contracts by several states cannot be permitted without seriously affecting their efficiency. If the Louisiana "place of delivery" rule is poor, that is a matter for the Louisiana Supreme Court to decide, not the federal courts sitting in Louisiana diversity cases.

Moreover, on the choice-of-laws questions, the instant case conflicts with other decisions[33] of the Court of Appeals below in *Ideal Structures Corporation v. Levine Huntsville Development Corporation,* 396 F. 2d 917; *Float-Away Door Co. v. Continental Casualty Co.,* 372 F. 2d 201; *Pan American Life Ins. Co. v. Blanco,* 362 F. 2d 167, and *Doss v. Apache Powder Co.,* 430 F. 2d 1317.

The conflict between the decision in the instant case and the decisions of the Louisiana Supreme Court in *Johnson v. St. Paul Mercury Ins. Co., supra,*[34] and the cases cited in footnote 20, *supra,* has been pointed out.

The court below held that Wisconsin has no notice

33. In addition to its decisions in Louisiana diversity cases cited in footnote 21, *supra.*

34. The facts in *Johnson v. St. Paul Mercury Ins. Co., supra,* have been analyzed and found to set forth a perfect example of a "false conflict" in a recent comment by Professor Couch in 45 Tulane Law Review, p. 100. However, the Louisiana Supreme Court chose not to follow the modern trend.

statute but that a Louisiana statute requires notice. It appears apparent that a "true" conflict exists between the laws of the two states. However, even if no true conflict exists and even if the *Klaxon* rule is inapplicable, nevertheless the Court of Appeals below was still bound to apply Louisiana substantive law under the rule in *Erie R. Co. v. Tompkins, supra.*[35] Petitioner should not be penalized because it removed the instant case from a Louisiana state court to the federal courts which accepted jurisdiction because of diversity.

4. Alternatively, on the final issue involving sufficiency of compliance by petitioner with the Louisiana notice statute, the decisions of the courts below conflict with decisions of the Court of Appeals, 2 Cir. in *Loss v. Mutual Life Ins. Co. of New York*, 334 F. 2d 242, *affirming* 230 F. Supp. 329, and *Mayers v. Massachusetts Mutual Life Ins. Co.*, 11 F. Supp. 80, *aff.* 77 F. 2d 1007, cert. den. 276 U. S. 594.[36]

In the instant case, the Court of Appeals below held as follows:

> "A notice of premium payment due was issued to Lester, Sr. indicating that on the premium due date of May 1, 1962 he would owe the yearly premium of $2,252.50 and $451.18 in interest due on the loan. *But the notice*

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35. Paradoxically, the Court of Appeals below, at the end of its decision in the instant case, considered itself bound by Louisiana substantive law on the question of penalties and attorney's fees, citing *Erie R. Co. v. Tompkins, supra.*

36. The decisions below also conflict with decisions of the Georgia Supreme Court in *General American Life Ins. Co. v. Butts*, 193 Ga. 350, 18 S.E. 2d 542, 140 ALR 677; the Supreme Court of Tennessee in *Mills v. National Life Ins. Co.*, 136 Tenn. 350, 189 S.W. 691; and the Texas Court of Civil Appeals in *Aetna Life Ins. Co. v. Eilers*, 367 S.W. 2d 732.

> *did not indicate that the automatic policy loan provision was ineffective.* Moreover, the record does not show with certainty when the notice was issued by appellant or received by Lester, Sr." (Emphasis by the Court).

The foregoing holding is contrary to the provisions of the Louisiana notice statute.[37] That statute provides that a life insurer shall not declare a policy forfeited or lapsed "for non-payment when due of any premium, installment, loan or interest, or any portion thereof *required by the terms of the policy to be paid*, unless a written or printed notice stating (1) The amount of such premium, installment, loan or interest, or portion thereof *due* on such policy" shall be sent to the insured. There is no requirement whatever in the statute that the notice should indicate that the automatic policy loan provision was ineffective.

In the instant case, it was stipulated that the insured, Lester, Sr., was issued a notice prior to the premium due date of May 1, 1962. The notice is reproduced in the opinion of the trial court below and shows that the insured was notified that he would owe the yearly premium of $2,252.50 and $451.18 in interest due on a loan. Business records of petitioner show that this notice was mailed to Lester, Sr. on April 13, 1962. The notice fully set forth the entire amount which the insured would be required to pay and the entire amount which was *due* under the provisions of the policy.

On August 2, 1961, Lester, Sr. had obtained a policy loan of $12,398.84 from petitioner, secured by the cash surrender value of the policy. It is well established that such an

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37. R.S. 22:177, Louisiana Revised Statutes, Appendix A, *infra*. p. 26.

advance or loan does not have to be repaid by the insured and was not due. In *Williams v. Union Central Life Ins. Co.*, 291 U. S. 170, 179, 78 L. Ed. 711, 717, *54* S. Ct. *348*, this Court said:

> "As this Court pointed out in *Board of Commissioners v. New York Life Ins. Co.*, 216 U. S. 517, 522, 54 L. Ed. 597, 601, 30 S. Ct. 385, such advances being against the surrender value do not create a 'personal liability' or a 'debt' of the insured, but are merely a deduction from the sum that the company 'ultimately must pay'. While the advance is called a 'loan' and interest is computed in settling the account, 'the item never could be sued for' and in substance 'is a payment, not a loan' ".

In the *Loss, Mayers, Butts, Mills* and *Eilers* cases, *supra*, the plaintiffs argued that the interrelationship between the premium and loan provisions of the policy created requirements for a notice concerning the automatic loan provisions in addition to the premium notice. However, the courts in each case rejected such arguments and held that no such additional notice was required.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

Dated: March 1, 1971

APPENDIX A

LOUISIANA CIVIL CODE

Art. 10. Laws governing form and effect of written instruments and of wills affecting movables

Art. 10. The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.

The exception made in the second paragraph of this article does not hold, when a citizen of another State of the Union, or a citizen or subject of a foreign State or country, disposes by will or testament, or by any other act *causa mortis* made out of this State, of his movable property situated in this State, if at the time of making said will or testament, or any other act *causa mortis*, and at the time of his death, he resides and is domiciliated out of this State.

LOUISIANA STATUTES ANNOTATED

R.S. 22:177. Written notice required before lapsing life policies

No life insurer shall within one year after default in payment of any premium, installment, loan or interest, declare forfeited or lapsed any policy issued or renewed, and not issued upon the payment of monthly or weekly premiums or for a term of one year or less, for non-payment when due of any premium, installment, loan or interest, or any portion thereof

required by the terms of the policy to be paid, unless a written or printed notice stating:

(1) The amount of such premium, installment, loan or interest, or portion thereof due on such policy; and

(2) The place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured or the assignee of the policy if notice of the assignment has been given to the insurer, at the last known post office address of such insured or assignee, postage prepaid by the insurer or any person appointed by it to collect such payment, at least fifteen and not more than forty-five days prior to the date when the same is payable.

No policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Any payment demanded by such notice and made within the time limit shall be taken to be full compliance with the requirements of the policy in respect to the time of such payment.

The affidavit of any officer, clerk or agent of the insurer or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the insurer issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued. This Section shall not apply to group insurance policies.

APPENDIX B

OPINION OF THE LOWER COURT

DON E. LESTER, JR.,

v.

AETNA LIFE INSURANCE COMPANY.

Civ. A. No. 9836.

United States District Court

W. D. Louisiana,

Shreveport Division.

Oct. 24, 1968.

RULING ON THE MERITS

BEN C. DAWKINS, JR., Chief Judge.

Plaintiff, as named beneficiary of a life insurance policy issued by defendant, seeks recovery of the proceeds allegedly due him under the policy. Suit was originally filed in the Tenth Judicial District Court, Natchitoches Parish, Louisiana, but was timely removed to this Court. Our jurisdiction is based upon 28 U.S.C. § 1332, diversity of citizenship, and involves the requisite amount in controversy. The case has been submitted to us, without formal hearing, on joint stipulation of the parties. The facts are agreed upon as set forth below.

The policy of life insurance, having a face amount of $50,000, was issued May 1, 1952, to Don E. Lester, Sr., then

a resident of Milwaukee, Wisconsin. Thus May 1 of each year was the anniversary date and premium due date.

Some of the pertinent provisions of the policy follow. Clause 4 provides:

> "All premiums shall be paid in advance at the Home Office of the Company, or to its authorized agent in exchange for a receipt signed by its Secretary or Assistant Secretary and countersigned by the agent. If any such premium is not paid when due, this policy shall cease, subject to the values and privileges hereinafter described; except that a grace of thirty-one days, during which the policy shall remain in full force, will be allowed for the payment of any premium after the first. * * *"

Clause 6 provided that the company would make loans on the security of the policy for an amount not in excess of the net loan value[1] of the policy. Specified per annum rate of interest on such loans was 5%.

Clause 8 contains an automatic loan provision which is available if due written request is made for its operation while there is no default in payment of premiums due. Essentially this clause provides that the amount of any premium due and not paid before the end of the 31-day grace period will

1. Clause 6 defines "loan value" and "net loan value" respectively as follows:

   "The loan value of the policy at any time shall be that amount which, with interest to the end of the current policy year or to the end of the current premium period if earlier, shall equal the cash value [i. e., cash surrender value] for the end of such policy year or period. The net loan value of the policy shall be the loan value of the policy less any unpaid premium for the current premium period."

automatically be loaned by the company and charged as an indebtedness secured by the policy. However, if the loan value is insufficient to cover the whole premium due, no automatic premium loan would be made under the provisions of Clause 8 but the provisions of Clause 7 would apply.

Clause 7 contains three options available to the insured in the event the automatic premium loan provision was insufficient to cover the total premium due. If none of the options provided in the policy were selected by the insured, the policy stipulated that insurance would be continued automatically as extended term insurance under Option (c). If there were any indebtedness against the policy, the extended term insurance would be for the sum insured less the indebtedness and for such a period as the cash value less the indebtedness would purchase.

When Lester, Sr., was issued the policy on May 1, 1952, he requested operation of the automatic loan provision in Clause 8. He timely paid the premiums for the policy years through 1961, making the total amount of premiums paid $22,520.

In 1957, Lester, Sr., with full knowledge of the insurer, moved his domicile from the State of Wisconsin to Natchitoches Parish, Louisiana, where he lived until his death on February 2nd, 1963. While in Louisiana, he made the following modifications and changes in this contract.

Two changes of beneficiaries were effected. The first was on December 22nd, 1958, when Lester, Sr., made the administrator of his estate the beneficiary. The second was

on October 27, 1961, when Lester, Sr., named Lester, Jr., plaintiff, as sole beneficiary of the policy.

August 2nd, 1961, the insured requested and obtained a policy loan of $12,398.84 from defendant. The loan was secured by the cash surrender value of the policy.

May 1st, 1962, the yearly premium of $2,252.50 became due. In addition, Lester, Sr., owed $451.18 interest on the policy loan of $12,398.84, making a total indebtedness of $12,850.02. On that date, the cash value of the policy was $12,850.00. Thus the total indebtedness against the policy exceeded the cash surrender value by two cents.

A notice of premium payment due was issued by defendant to Lester, Sr., indicating that on the premium due date of May 1, 1962, he owed $2,252.50, the annual premium, and $451.18, the interest due on the loan. There is no concrete evidence in the record establishing the date this notice was issued by the company or received by Lester, Sr.

Sometime between July 2d and July 5th Lester, Sr., was sent a notice dated July 2d, 1962, along with a letter dated July 3rd, 1962. The notice contained the following statement: "Although the automatic premium loan provision is in force, your policy does not have sufficient value to pay this premium by loan * *. Unfortunately your policy has lapsed without value other than your right to apply for reinstatement because indebtedness exceeds the cash value." The letter advised Lester, Sr., that he could complete and return, together with his remittance of $2,252.50 for the defaulted premium, an application for reinstatement. Lester, Sr., immediately returned to

the company a check for $2,703.68, dated July 6, 1962, the application for reinstatement, and his letter from the company dated July 3rd, 1962. At the bottom of the letter, he made the following notation:

> "Sorry, but Notice was misplaced. Please notify me if you reinstate.
>
> DEL"

At that time there was more than sufficient money in his bank account to cover the check sent to the company.

In a letter dated August 8th, 1962, defendant advised Lester, Sr., that a physician's statement, including details of any cardiovascular findings, must be sent to the company before further consideration could be given to his application. When defendant received no response to this letter, they advised Lester, Sr., in a letter dated January 23rd, 1963, that, because he had not submitted the physician's statement, they were obliged to return his check for $2,703.68. February 2nd, 1963, Lester, Sr., died.

The contested issues of law are: (a) Whether the law of Wisconsin or Louisiana applies; (b) whether defendant gave Lester, Sr., adequate notice of the premium due on May 1, 1962, and of the inapplicability of the automatic loan provision at that time; (c) whether defendant is estopped from denying that the policy lapsed; and (d) whether defendant is estopped from denying reinstatement of the policy.

On the first issue, we hold firmly that Louisiana law applies.

[1] Since Federal Courts must apply the conflicts of law rule of the forum in a diversity case, Klaxon Company v. Stentor Electric Mfg. Co., Inc., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), we direct our attention to the law of Louisiana on that subject.

The first paragraph of Article 10 of the Louisiana Civil Code provides: "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed." From this provision a general rule has evolved that the law of the place where the insurance policy is delivered ordinarily must govern. See Davis v. Insurance Company of North America, 268 F. Supp. 496 (E.D. La. 1967), and cases cited therein. Defendant asks us rigidly to apply that rule and hold that the law of Wisconsin, where the policy was delivered, applies. We should ignore, says defendant, the erosions and inroads made into traditional conflicts of law rules by recent decisions of a Louisiana appellate court. In these decisions there is recognition of the tremendous changes which the area of conflicts of law has undergone since 1965. Applying the "center of gravity" or "grouping of contacts," many courts throughout the United States have discarded or modified the traditional and once well established conflicts rules. The new and more rational approach avoids mechanical application of the law of the place of the making or performance of a contract; rather it places emphasis upon the laws of the State having the most significant quantitative *or* qualitative contacts directly concerning the matter in dispute. 16 Am. Jur. 2d, Conflicts of Laws, § 42, at page 66.

The only Louisiana case which specifically has rested its holding on the modern conflicts approach is Universal C. I. T. Credit Corporation v. Hulett, 151 So. 2d 705 (La. App. 3 Cir. 1963). There suit was brought for a deficiency judgment after sale of a repossessed automobile failed to bring enough to pay the balance due on the purchase price. After a conditional sale of the car had been effected in Indiana, the car was, with the knowledge, and at least implied consent, of vendor, taken to Louisiana. Upon vendee's default in payments, the car was repossessed in Louisiana, and then taken back to Indiana, where it was resold. Suit then was brought in Louisiana for a deficiency judgment. Plaintiff finance company, to whom the contract had been immediately assigned, argued that, by the law of Indiana, where the conditional sales contract was confected, the procedural requirement for the preservation of the right to claim a deficiency judgment was met. Holding that Louisiana law was applicable, the trial court concluded that since no appraisement, as required by the Louisiana Deficiency Judgment Act, was made, plaintiff's suit should be dismissed. The Third Circuit Court of Appeal affirmed, concluding that the whole affair had enough significant connecting elements and contacts with Louisiana to justify application of Louisiana law. Judge Tate, speaking for the Court, said:

> "To decide a case by the application of formal conflict-of-law principles is often not so much a matter of logic and the determination of the single correct answer by the logic-dictated application of such principles, as it is the selection by the court of the forum

from among the competing intra-state and extra-state factors those which that court regards to be significant and which justify application of the particular conflict-of-law principle or principles which afford weight to the intra- (or extra-) state factors found to be significant by the court of the forum [Citing cases.] * * *

"As some of the cited sources note, in many instances the courts actually choose those formal conflict-of-law principles which justify the application of the law of the forum whenever there are sufficient factual contacts with the forum as to justify the application of its own law. It has in fact been suggested that an appropriate conflict-of-law approach is for the court of the forum frankly to apply its own law whenever through the factual elements of the case the forum state has any valid reason to apply its own law and policy, providing of course this does not violate constitutional full faith and credit requirements. See especially Currie, cited above. See also Bernkrant v. Fowler, 55 Cal. 2d 588, 12 Cal. Reptr. 266, 360 P. 2d 906 (1961), an important recent decision frankly utilizing the approach of balancing the interests of the forum against those of the foreign jurisdiction as a guide to deciding choice-of-law problems.

* * * * * *

"We reach this result whether we regard the significant factor as being that the vehicle was sold to Louisiana residents for use in Louisiana, that the repossession actually took place thereafter in Louisiana,

> that Louisiana has a valid governmental interest in enforcing its public policy barring deficiency judgments when chattels of Louisiana debtors are repossessed in Louisiana and subsequently sold without an appraisement—or whether, as is actually the case, a combination of all these factors indicates that it is more appropriate for the Louisiana law to be applied by a Louisiana court in deciding this matter, than that of another forum which has less significant factual connections with the matter in litigation."

In concurring opinions in Doty v. Central Mutual Insurance Company, 186 So. 2d 328 (La. App 3 Cir. 1966), cert. den. 249 La. 486, 187 So. 2d 451 (1966), and Blanchard v. Blanchard, 180 So. 2d 564 (La. App. 3 Cir. 1965), Judge Tate reiterated his view that this modern conflicts approach should be taken by Louisiana courts.

Defendant strongly relies on the language in Fry v. Lamb Rental Tools, Inc., 275 F. Supp. 283 (W.D. La. 1967). That was a diversity case in which plaintiffs were minor children seeking recovery for the wrongful death of their parents in the crash of defendant's airplane. Relying on *Doty* and *Blanchard*, plaintiff argued that the more modern theory of "significant contacts" or "center of gravity" should be followed, under which theory Louisiana law would govern the rights of the parties. It was pointed out that the circumstances of the case were especially appropriate for the application of the theory. Choosing instead to apply Louisiana's traditional

"place of the injury" conflicts rule for tort cases, Judge Putnam said:

> "* * * The consideration set out by Judge Tate in the two appellate court decisions are most compelling and it is the opinion of this court that this rule will ultimately come to be the law of Louisiana. *But until an authoritative pronouncement is forthcoming in a case where the question is squarely presented, we cannot substitute our views for an established principle.*" (Emphasis added.)

If, by his last statement quoted above, Judge Putnam meant that in every case, even one with circumstances such as here, the Federal Court cannot decide a State Court would modify or reverse a previous position, we cannot agree. In Mason v. American Emery Wheel Works, 241 F. 2d 906 (1 Cir. 1967), cited with approval in Necaise v. Chrysler Corp., 335 F. 2d 562 (5 Cir. 1964), and Grey v. Haynes-Sammons Chemical Co., 310 F. 2d 291 (5 Cir. 1962), persuaded by pure dicta in a recent Mississippi Supreme Court case and by the status of the law in other States, the Court concluded that the Mississippi Supreme Court was prepared to overrule a previous decision. There the Court said:

> "* * * If the Supreme Court of Mississippi had recently reconsidered the rule it applied in Ford Motor Co. v. Myers, supra, [151 Miss. 73, 117 So. 362], and had decided to adhere to it on the ground of stare decisis, no doubt the federal courts would have had to accept the local law as so declared. But it would be

gratuitous and unwarranted to assume that the Supreme Court of Mississippi would now so hold, when we bear in mind the readiness of other courts, in conservative jurisdictions at that, to overrule their earlier holdings and to bring their jurisprudence into accord with what is now the overwhelming weight of authority. * * *

* * * * * *

"Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction. * * * We think it is fair to infer from this latest expression by the Supreme Court of Mississippi that it is prepared to reconsider and revise the rule it applied in Ford Motor Co. v. Myers whenever it may have before it a case that squarely presents the issue. We have no doubt that when this occasion does come to pass, the Supreme Court of Mississippi will declare itself in agreement with the more enlightened and generally accepted modern doctrine."

See also Anderson v. Linton, 178 F. 2d 304 (7 Cir. 1949) where the court decided that Iowa, having no controlling decisions on a certain legal question, would be willing to adopt the modern rule expressed in the Restatement.

If faced with the conflicts of law question before us, we believe that the Louisiana Supreme Court would be influ-

enced by Judge Tate's enlightened expression in *Hulett, Doty,* and *Blanchard, supra.* We also believe the Court would be influenced by the trend in other jurisdictions. Numerous States have adopted the "most significant relationship" rule set forth in the Restatement (2nd), Conflicts of Law, § 332, or a similar rule as an escape from the rigidity of *lex loci contractus.* See, e. g., Baffin Land Corporation v. Monticello Motor Inn, Inc., 70 Wash. 2d 893, 425 P. 2d 623 (1967); Bernkrant v. Fowler, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P. 2d 906 (1961); Boston Law Book Co. v. Hathorn, 119 Vt. 416, 127 A. 2d 120 (1956); Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99, 50 A.L.R. 2d 246 (1954); W. H. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E. 2d 417 (1945).

In *Baffin, supra,* the Washington Supreme Court explained the absurdity of strict application of *lex loci contractus* in the modern world as follows:

> "What if the vice president of Master Video had placed the rental agreement, unsigned, in his brief case and had left for a business appointment in Florida? Once aloft, he might [choose] to forego the various pleasures of air travel and make good use of the travel time by perusing the unfinished business in his brief case. Somewhere en route, he affixes his signature to the Monticello Hotel television rental agreement. Should a court attempt to ascertain the approximate time of the signing during the flight? By interpolating the pilot's log, should the judge conclude that the law of North Carolina applies, since the airspace of the Tar Heel State was the actual scene or loci of the execution

of the contract? Or should the governing law be the law of the state of destination? Of the state of embarkation? The absurdity of placing the choice of law *necessarily* on one fortuitous event—the place of execution—seems to be patent. It is not surprising then that at its 1960 meeting, the American Law Institute rejected the primacy of the place of making of the contract theory by a vote of 77 to 36. AM. LAW INSTITUTE, 37th ANNUAL MEETING PROCEEDINGS 505 (1961)."

[2, 3] Of course, we realize that Louisiana's *lex loci contractus* rule is statutory (La. Civ. Code, art. 10) rather than jurisprudential. Thus Louisiana Courts are not free to discard the rule. But we feel that the Louisiana Supreme Court, in construing the statutory rule, would consider the appellate decisions by Judge Tate and the modern trend of emphasizing significant contacts. And we believe that where, as here, Louisiana contacts are so significant,[2] Louisiana courts would give a party the benefits of Louisiana law.

Indeed, it might even be said that the second paragraph of Art. 10 of the Louisiana Civil Code provides a basis for applying the "most significant contacts" rule. It provides:

"But the effect of acts passed in one country to have

2. Insured had lived in Louisiana, paying his premiums, for six years. During this time he made three significant business arrangements with defendant. Two of these were changes of beneficiaries of his policy; the other was the obtaining of a loan from defendant secured by his policy. Certainly the Louisiana Supreme Court would consider these contacts too significant to be overriden by a single fortuitous event—the delivery of the insurance contract in Wisconsin.

effect in another country, is regulated by the laws of the country where such acts are to have effect."

It is often said that where the parties made no choice, it is most likely that they expect the law of the State with the most significant contacts to apply. See, e. g., *Baffin, supra,* 425 P. 2d at 627.[3]

We next turn our consideration to the sufficiency of the notices given to the insured before cancellation of his policy. Louisiana R.S. 22:177 provides:

"No life insurer shall within one year after default in payment of any premium, installment, loan or interest, declare forfeited or lapsed any policy issued or renewed, and not issued upon the payment of monthly or weekly premiums or for a term of one year or less, for non-payment when due of any premium, installment, loan or interest, or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating:

"(1) The amount of such premium, installment, loan or interest, or portion thereof due on such policy; and

3. Compare the following discussion in Universal C. I. T. Credit Corp. v. Hulett, supra, 151 So. 2d at 709:

"Further, even if we regard this contract as governed by the law of the 'place where the contract was intended to have effect', it may occur to us that the contract contemplated several factual incidents intended to be effected in different places, including (a) execution of the contract in Indiana; (b) removal of the car to Louisiana; (c) repossession of the car in the event of default, probably but not necessarily in Louisiana; and (d) in that event, repossession sale either in Louisiana or in Indiana."

"(2) The place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured or the assignee of the policy if notice of the assignment has been given to the insurer, at the last known post office address of such insured or assignee, postage prepaid by the insurer or any person appointed by it to collect such payment, at least fifteen and not more than forty-five days prior to the date when the same is payable.

"No policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Any payment demanded by such notice and made within the time limit shall be taken to be full compliance with the requirements of the policy in respect to the time of such payment.

"The affidavit of any officer, clerk or agent of the insurer or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the insurer issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture

ensued. This Section shall not apply to group insurance policies. Amended and reenacted Act 1958, No. 125."

[4, 5] R.S. 22:177 is a forfeiture statute, and thus must be construed strictly, Boring v. Louisiana State Insurance Company, 154 La. 549, 97 So. 856 (1923); Courtney v. Volunteer State Life Insurance Co., 187 So. 338 (La. App. 1st Cir. 1939); Jasper v. Mutual Life Insurance Co. of New York, 10 La. App. 259, 120 So. 714 (La. App. 2 Cir. 1929). Its purpose is "to protect the insured against losing his policy, through mere neglect to pay the premium, and also to give him a fair chance of meeting the payments when due."[4] *Boring, supra*, 97 So. at 858.

[6] The notice defendant contends was sent within the statutory fifteen to forty-five days requirement appears as follows:[5]

4. We realize that the 1958 amendment to the notice statute was favorable to insurers, primarily by dispensing with the requirement that "the notice shall also state that unless such premium, interest and installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value, extended insurance or paid-up policy." Act. No. 68 of 1906. This amendment, however, did not alter the purpose of the statute.

5. It is by no means clear that defendant's evidence suffices to prove that the notice of premium due was sent within the fifteen- to forty-five day time limit required in the notice statute. Defendant's only evidence is a letter from Aetna to attorney for plaintiff. This letter (Ex. D-6) states that premium notices are, by regular practice, mailed not more than forty-five days or less than fifteen days before the premium due date. The letter further states that Aetna's records show that notices for premiums due May 1st, 1962, were mailed on April 13, 1962, and that nothing further in Aetna's records indicates that the notice in question was not among those mailed on that date.

AETNA LIFE Insurance Company
Hartford 15, Connecticut

PAYMENT DUE

Policy Number	Agency	Premium for	Date Payment Due
N 1725929	MIL	12 Months	May 1, 1962

Please enter any change of address below.
List other policies to be changed on reverse.

AETNA

Donald E. Lester	Premium	$2252.50
Route 1 Box 208	Interest	451.18
Natchitoches La	Due	2703.68

Please make check payable to AETNA LIFE and send with this notice in enclosed envelope to

AETNA LIFE INSURANCE COMPANY
KASCHE & KASCHE, General Agents
210 W. Michigan Street
Milwaukee 3, Wisc.

IMPORTANT NOTICES ON REVERSE SIDE

Before determining the sufficiency of this notice, we must isolate the reasons the policy was declared lapsed. It is clear to us that there are two.

The first is that Lester, Sr., defaulted in payment of the loan and interest. Indeed, defendant virtually admitted this as a reason for lapse in the notice dated July 2d, 1962, which stated:

> "Although the automatic premium loan provision is in force, your policy does not have sufficient value to pay this premium by loan * * *. Unfortunately your policy has lapsed without value other than your right

to apply for reinstatement because indebtedness exceeds the cash value."

The second reason the policy was declared lapsed is so obvious that it needs no explanation. It is failure to pay the premium due on May 1, 1962, within the thirty-one day grace period.

With these reasons for lapsing, defendant's notice, by the language in R.E. 22:177, should have included "The amount of such premium [$2,252.50] * * * loan [$12,398.84] [and] interest [$451.18] * * * due on such policy; * * *." Since the notice sent by defendant contained only the amount of premium and interest due, making no mention of the amount of the loan, it was fatally insufficient, and defendant did not have the power to declare the policy lapsed.

We are therefore of the opinion plaintiff should recover the following: $50,000, the face amount of the policy, less, of course, $2252.50, the amount of the premium due May 1, 1962, $12,398.84, the amount of the outstanding loan, and $451.18, the interest due at the time of insured's death, or $34,897.48, with interest thereon at five per cent, from February 2, 1963, the date of the death of the insured, until paid.

With this conclusion, it is unnecessary to consider plaintiff's estoppel argument.

A proper decree should be presented.

JUDGMENT OF THE LOWER COURT

IN THE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

* * * * * *

CIVIL ACTION NO. 9836

* * * * * *

DON E. LESTER, JR.

Plaintiff

versus

AETNA LIFE INSURANCE COMPANY

Defendant

* * * * * *

JUDGMENT

This action came on for decision before this Court, without formal hearing, on joint stipulation of the parties. After hearing the pleadings, evidence and arguments of counsel, the Court considering the law and the evidence to be in

favor of the plaintiff, DON E. LESTER, JR., and against the defendant, Aetna Life Insurance Company, for the written reasons given on October 24, 1968.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Don E. Lester, Jr., and against the defendant, Aetna Life Insurance Company, in the sum of Thirty-Four Thousand Eight Hundred Ninety-Seven and 48/100 ($34,897.48) Dollars with interest thereon at the rate of five (5%) per cent per annum from February 2, 1963, until paid and for all costs of these proceedings.

JUDGMENT RENDERED, in Shreveport, Louisiana, on October 24, 1968.

JUDGMENT SIGNED in the City of Shreveport, Parish of Caddo, State of Louisiana, this 30th day of October, 1968.

s/BEN C. DAWKINS, JR.
CHIEF JUDGE

OPINION OF THE COURT OF APPEALS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27539

DON E. LESTER, JR.
Plaintiff-Appellee-Cross Appellant,

versus

AETNA LIFE INSURANCE COMPANY,
Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Western District of Louisiana

(October 28, 1970)

Before AINSWORTH, DYER and SIMPSON,
Circuit Judges.

SIMPSON, Circuit Judge: This is a Louisiana based, non-jury diversity case brought against Aetna Life Insurance Company (Aetna)[1] by the appellee, Don E. Lester, Jr., the sole beneficiary of a life insurance policy issued to his deceased

1. Aetna Life Insurance Company is a Hartford, Connecticut domiciled corporation doing business in Wisconsin and Louisiana.

father, Don E. Lester, Sr. to recover proceeds of the policy.[2] Lester's timely presented claim under the policy was denied by Aetna on the ground of lapse for non-payment of premium. Applying the Louisiana Notice Statute,[3] the district court held for the appellee, explaining that under the circumstances of this case the Louisiana Supreme Court would apply the law of Louisiana and not the law of Wisconsin. Judgment for $34,897.48[4] with interest and costs was entered and Aetna appealed. Appellee cross-appealed seeking penalties and attorneys' fees. We affirm the district court's judgment on direct appeal and deny relief to appellee on his cross-appeal.

The principal issues confronting us here are (1) the applicability of Louisiana law in preference to the law of Wisconsin; (2) the sufficiency of the notice of lapse given by Aetna to the insured; (3) whether or not Aetna was estopped to claim lapse of the policy; and (4) the failure of the trial court to impose penalties and award attorneys' fee (raised by the cross-appeal). Discussion and decision of issue (3) is rendered unnecessary by our disposition of issues (1) and (2).

The controlling facts were stipulated. For our examination they will be taken from the district court's opinion-order[5] with minor additions and modifications.

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2. This suit was originally filed in the state courts of Louisiana, but was timely removed under Title 28, U.S.C., Section 1441, et seq., to the court below which took diversity jurisdiction pursuant to Title 28, U.S.C., Section 1332.

3. Louisiana Revised Statute 22:177, note 14, infra.

4. The face amount of the policy less the amount of an unpaid policy loan and interest, and less the amount of the unpaid premium.

5. *Lester v. Aetna Life Insurance Co.* (W.D. La. 1968), 295 F. Supp. 1208.

On May 1, 1952, a life insurance policy for the face amount of $50,000 was issued in Milwaukee, Wisconsin, by appellant's Wisconsin agent to Don E. Lester, Sr. By his application Lester, Sr. invoked operation of the automatic loan provisions of clause 8 of the policy (infra) and paid his first yearly premium of $2,252.50. Yearly premiums in that amount were due May 1 of each year thereafter, subject to a thirty-one day grace period.

It is necessary here to quote from or to paraphrase pertinent provisions of the policy. Clause 4 provided:

> "All premiums shall be paid in advance at the Home Office of the Company, or to its authorized agent, in exchange for a receipt signed by its Secretary or Assistant Secretary and countersigned by the agent. If any such premium is not paid when due, this policy shall cease, subject to the values and privileges hereinafter described: *except that a grace of thirty-one days,* during which the policy shall remain in full force, will be allowed for the payment of any premium after the first. * * *" (Emphasis added)

Clause 6 provided that the company would make loans on the security of the policy for an amount not in excess of the net loan value[6] of the policy. The specified rate of interest on

6. Clause 6 defined "Loan value" and "net loan value" respectively as follows:

> "The loan value of the policy at any time shall be that amount which, with interest to the end of the current policy year or to the end of the current premium period if earlier, shall equal the cash value [i.e., cash surrender value] for the end of such policy year or period. The net loan value of the policy shall be the loan of the policy less any unpaid premium for the current premium period".

such loans was 5% per year.

Clause 8 contained an automatic loan provision which is available if due written request is made for its operation while there is no default in payment of premiums due. Essentially this clause provides that the amount of any premium due and not paid before the end of the 31-day grace period will automatically be loaned by the company and charged as an indebtedness secured by the policy. However, if the loan value should be insufficient to cover the whole premium due, no automatic premium loan would be made under the provisions of Clause 8 but the provisions of Clause 7 would apply.

Clause 7 contained three options available to the insured in the event the automatic premium loan provision should be insufficient to cover the total premium due. If none of the options provided in the policy were selected by the insured, the policy stipulated that insurance would be continued automatically as extended term insurance under Option (C). In case of any indebtedness against the policy, the extended term insurance would be for the sum insured less the indebtedness and for such a period as the cash value less the indebtedness would purchase.

Lester, Sr. timely paid his yearly premiums from his Wisconsin residence until 1957. At that time, with the full knowledge of Aetna he moved to Natchitoches Parish, Louisiana, where he lived until his death on February 2, 1963. Lester, Sr. paid premiums on the policy in Louisiana as they became due from 1957 through 1961. He paid a total of $22,525 in premiums from 1952 through 1961.

After moving to Louisiana, Lester, Sr. entered into several transactions with Aetna concerning the life insurance policy in question. In 1958, he changed the beneficiary of the policy to the administrator of his estate. Then on October 27, 1961, he again changed beneficiaries, this time naming the appellee, Lester, Jr., sole beneficiary. On August 2, 1961, Lester, Sr. obtained a policy loan of $12,398.84 from appellant, secured by the cash surrender value of the policy.

On May 1, 1962, the yearly premium became due. At that time the policy loan indebtedness totaled $12,850.02, composed of principal in the amount of $12,398.84 and interest due of $451.18. The cash surrender value of the policy on the May 1, 1962 anniversary was precisely $12,850.00. The 2¢ deficiency prevented the automatic policy loan provision from taking effect. Also, there was of course no cash value available to secure extended term insurance, because of the 2¢ excess of indebtedness over cash value.

A notice of premium payment due was issued to Lester, Sr. indicating that on the premium due date of May 1, 1962 he would owe the yearly premium of $2,252.50 and $451.18 in interest due on the loan. *But the notice did not indicate that the automatic policy loan provision was ineffective.* Moreover, the record does not show with certainty when the notice was issued by appellant or received by Lester, Sr.

On July 2, 1962, 31 additional days after expiration of the 31-day grace period, Aetna issued a notice informing Lester, Sr. that the automatic loan provision was inoperative, because the policy did not have sufficient remaining value to

pay the premium by loan, and, therefore, the policy had lapsed without value other than the right to apply for reinstatement. Aetna, by letter dated July 3, 1962, advised Lester, Sr. that he could apply for reinstatement by completing a form and remitting the overdue premium of $2,252.50. Lester, Sr. immediately mailed to appellant the completed application, a check for $2,703.68 (yearly premium plus loan interest) dated July 6, 1962, and a note reading: "Sorry, but Notice was misplaced. Please notify me if you reinstate". This check was good and would have been honored by the bank at any time it was presented between July 6, 1962 and January 23, 1963.

On August 8, 1962 Aetna advised its insured by letter that he must submit a physician's statement, including details of any cardiovascular findings, before his application could receive further consideration.[7] Having received no response to its request for a physician's statement, the appellant by letter dated January 23, 1963 returned the decedent's check for $2,703.68. Ten days later, February 2, 1963, the insured died.

At the threshold we must consider whether or not the district court erred when it applied the Louisiana law in lieu of the Wisconsin law. The district court's reasoning was that since Louisiana was the place of the most "significant contacts" the Louisiana premium notice statute governed. The effect of this was to require Aetna before lapsing the policy, to give the insured sufficient notice both that his May 1, 1962 premium was due and also that the automatic loan provision covering late premiums was inoperative.

7. When the policy was originally purchased Aetna had rated up Lester by adding five years to his age in computing premiums because of a physician's finding of heart ailment.

Conversely, under the law of Wisconsin, Aetna would have had no duty to give notice. The Wisconsin law contained no premium notice statute. Under it, therefore, the policy would have legally lapsed.

The argument for application of Wisconsin law is based on the traditional "lex loci contractus" doctrine, calling for application of the law where the contract was made, performed, or delivered. The policy involved here was of course "delivered" to Lester, Sr. in Wisconsin by appellant's Wisconsin agent. Hence on this appeal we must decide whether or not the district court correctly applied the "significant contacts" approach in lieu of the lex loci contractus or "place of delivery" approach.

It is helpful here to state and then reason from well established principles. In diversity cases, federal courts must apply the substantive law of the state. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). When a federal court sitting in a diversity case is faced with an apparent conflict between relevant laws of two or more states, it must resolve the conflict in accord with the conflict of laws principles developed by the courts of forum state. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). The rub is that it is sometimes not entirely clear what principles should be applied in a new fact situation. When this occurs, the court must closely scrutinize the specific facts, law, and equities involved and divine what law the Supreme Court of the forum state would apply.

In this case the district court followed the *Klaxon* mandate and went to the Louisiana conflicts of law rule embodied

in Article 10 of the Louisiana Civil Code which provides in pertinent part the following:

> "The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.
>
> But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect".

The district court recognized that from the first sentence of Article 10 the federal and state courts of Louisiana have evolved a general conflicts rule that the law of the "place where the insurance policy is delivered" must govern, citing *Davis v. Insurance Company of North America*, 268 F. Supp. 496 (E.D. La., 1967) and cases cited therein.[8] However, the district court declined to apply this rigid rule saying that the circumstances of this case required a more sophisticated and modern approach such as was applied by recent decisions of a Louisiana appellate court. Weight was given below to three recent decisions by Judge Tate of the Third Circuit of the Louisiana Court of Appeals.[9] In those cases Judge Tate has found authority in the second sentence of Article 10 for the

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8. For recent Louisiana Supreme Court reaffirmation of this doctrine, see *Theye Y Ajuria v. Pan American Life Ins. Co.*, 245 La. 755, 161 So. 2d 70 (1964).

9. *Universal C. I. T. Credit Corp. v. Hulett*, 151 So. 2d 705 (La. App. 3 Cir. 1963); *Dotz v. Central Mut. Ins. Co.*, 186 So. 2d 328 (La. App. 3 Cir. 1966) (concurring opinion) cert. denied 249 La. 486, 187 So. 2d 451 (1966) (the basis for denial of certiorari was not the concurring opinion of appellate court); *Blanchard v. Blanchard*, 180 So. 2d 564 (La. App. 3 Cir. 1965) (concurring opinion). See also Judge Rubin's opinion in the recent *Dean v. General Motors Corp.*, 301 F. Supp. 187, 194 (E.D. La. 1969).

"center of gravity" or "grouping of contacts" rule. These opinions are in line with recent developments in the decided cases providing an escape from the rigidity of the *lex loci contractus* rule. See, for example, *Baffin Land Corporation v. Monticello Motor Inn, Inc.*, 425 Pac. 2d 623 (Wash. 1967); *Bernkrant v. Fowler*, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P. 2d 906 (1961); *Boston Law Book Co. v. Hathorn*, 199 Vt. 416, 127 A. 2d 120 (1956); *Auten v. Auten*, 308 N.Y. 155, 124 N.E. 2d 99, 50 A.L.R. 2d 246 (1954); *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E. 2d 417 (1945).

The lower court noted this modern trend in other jurisdictions as well as in the Louisiana Circuit Court of Appeals to erode the "place of delivery" rule and apply the "center of gravity" or "grouping of contacts" rule. The district judge reasoned that in the light of the modern approaches the Louisiana Supreme Court would modify or reverse its previous "place of delivery" position.[10] The trial court posited that Louisiana law applied because the only contact Wisconsin had was a single fortuitous event, i. e. delivery of the insurance contract in 1952, and most of the significant "contacts"[11] took place in Louisiana. The court further argued that where, as

10. See *Mason v. American Emery Wheel Works*, 1 Cir. 1967, 241 F. 2d 906, cited with approval in *Necaise v. Chrysler Corp.*, 5 Cir. 1964, 335 F. 2d 562; and *Grey v. Haynes-Simmons Chemical Co.*, 5 Cir. 1962, 310 F. 2d 291. These cases stand for the proposition that a federal court may conclude that a state supreme court is prepared to overrule a previous decision and so hold.

11. Lester, Sr. had lived in Louisiana, paying his premiums, for six years. During this time he made three significant business arrangements with appellant. There were two changes of beneficiary under the policy and a policy loan was made secured by the policy. Also, Lester, Sr. owned another insurance policy issued by Aetna.

here, the parties made no choice, it is more likely than otherwise that they expected the law of the state with the most significant contacts to apply.

These arguments are persuasive and perhaps were convincing when written, but speculation as to what the Louisiana Supreme Court would do with the choice of law issue is at an end. The court has spoken, and in speaking has extinguished the theorizing of the trial court.

In the case of *Johnson v. St. Paul Mercury Ins. Co.*, 236 So. 2d 216 (decided March 30, 1970, rehearing denied May 4, 1970), the Louisiana Supreme Court, after a long and tedious examination of the merits of the modern approaches,[12] clearly and emphatically denounced the use of the "center of gravity" or "grouping of contacts" doctrine. In *Johnson* the court said that in their present state the "center of gravity" or "grouping of contacts" or related doctrines are in their formative stages and will not lend themselves to a sound declaration of new law. The message is loud and clear. The Louisiana Supreme Court is not ready to abandon the *lex loci* approach.

Moreover, we do not believe that *Johnson* may be distinguished by asserting that it is a *lex loci delicti* case inapplicable to *lex loci contractus* cases. The court in at least three places in its exhaustive opinion emphasized that it would

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12. The court dismissed characterizations such as "center of gravity", "grouping of contacts", "most significant relationship", "contacts" and "interests" as doing little to serve as a guide or to establish a rule of law which may be applied with any degree of certainty.

not abandon the *lex loci* approach in favor of the modern trends.[13]

The Louisiana Supreme Court used *lex loci* in the broad generic sense embracing both *lex loci delicti* and *lex loci contractus*.

Furthermore, we are not convinced that the Louisiana Supreme Court would deviate from the "place of delivery" rule to avoid a harsh result in an individual case. In *Johnson*, an automobile passenger, resident in Louisiana, but injured in an Arkansas accident, was denied recovery by application of the Arkansas guest passenger statute. The Court of Appeals, Second Circuit, was reversed for applying Louisiana law on the basis that most of the "contacts" were in Louisiana. We are persuaded that if the Louisiana Supreme Court were faced with the case at bar, they would likewise apply the *lex loci contractus* rule notwithstanding the harsh consequences to the

13. "Plaintiff advocates a course here which takes us away from the 'clear-cut rules of *lex loci* and compels acceptance of a doctrine not clearly defined in any respect. Such a change will involve this court in a legislative thought process in each case presented hereafter compelling the court to weigh all relevant interests in each fact situation and devise a rule for the solution of the case". 236 So. 2d at 223.

* * * * *

"Other than broad and vague generalizations that changing times, the speed of travel and the need to do justice in the individual case require a departure from *lex loci*, no compelling reasons have been advanced to support a departure from *lex loci*. We take it that the prime objective of the proponents of change is to do justice in the individual case." Ibid at 223.

* * * * *

"We are not satisfied that the abolition of *lex loci* is warranted. Accordingly, the judgment of the Court of Appeal is reversed and the judgment of the trial court is reinstated and made the judgment of this Court." Ibid at 224.

appellee,[14] provided a conflict exists.

Despite the above analysis, we affirm the district court's choice of law on different grounds since in our view no conflict is present. We go outside our own Circuit to find authority, in what is called the "false conflicts" rule in other jurisdictions. As we have stated above, in diversity conflict of laws cases federal courts are bound by the conflict of laws rule of the forum state. *Klaxon*, supra. We determine that here the *Klaxon* principle is inapplicable, because the parties and the court below have created a "false conflict". *Gaither v. Myers*, D.C. Cir. 1968, 404 F. 2d 216, 224; *Williams v. Rawlings Truck Lines, Inc.*, D.C. Cir. 1965, 357 F. 2d 581, 586; Cf. *Denny v. American Tobacco Corp.*, 308 F. Supp. 219, 222 (N.D. Cal. 1970). See generally CURRIE, Notes on Methods and Objectives in the Conflict of Laws, in *Selected Essays on the Conflict of Laws*, 177, 180 (1963); CAVERS, The Choice-of-Law Process 88-96 (1965), passim; cf. Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657 (1959). See also Comment, False Conflicts, 55 Calif. L. Rev. 74 (1967). But see Ehrenzweig, "False Conflicts" and the "Better Rule"; Threat and Promise in Multistate Tort Law, 53 Va. L. Rev. 847 (1967). The real issue is whether or not appellant is bound by the Louisiana notice statute.[15]

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14. One is inclined to refer to author Harry Golden's title, "For Two Cents Plain" at this point.

15. Louisiana Revised Statute 22:177:

> § 177. Written notice required before lapsing life policies
>
> No life insurer shall within one year after default in payment of any premium, installment, loan or interest, declare forfeited or lapsed any policy issued or renewed, and not issued upon the payment of monthly or weekly premiums or for a term of one year or less, for non-payment when due of any premium, installment, loan

A "false conflict" occurs "when one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, * * *." See *Williams, text,* supra; CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. Chi. L. Rev. 9, 10 (1958). For example, as the court said in *Gaither,* supra,:

> "Thus, we are not concerned with any real 'conflict' between the interests of Maryland and the District in this case. The fact that two states have different rules where all the factors are oriented to one state does not necessarily mean that there is a 'conflict' in

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or interest, or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating:

(1) The amount of such premium, installment, loan or interest, or portion thereof due on such policy; and

(2) The place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured or the assignee of the policy if notice of the assignment has been given to the insurer, at the last known post office address of such insured or assignee, postage prepaid by the insurer or any person appointed by it to collect such payment, at least fifteen and not more than forty-five days prior to the date when the same is payable.

No policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Any payment demanded by such notice and made within the time limit shall be taken to be full compliance with the requirements of the policy in respect to the time of such payment.

The affidavit of any officer, clerk or agent of the insurer or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the insurer issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within two years from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued. This Section shall not apply to group insurance policies. Amended and reenacted Acts 1958, No. 125.

> which one state demands and the other rejects the application of its rule to a situation where the pertinent factors arise in two or more states. Where there is no such conflict of interest in a multistate situation, as this court and others have noted there is a 'false conflicts' situation",

and in *Daniels*, supra,:

> "In sum, this case presents a classic 'false conflicts' situation. Adoption of the New York doctrine of estoppel will further the interests of New York, but will not interfere with any of the articulated policies of the District of Columbia. On the other hand, application of the District's rule allowing proof of sale would impinge upon New York's interests, without furthering any of the recognizable policies of the District. As a false conflicts case, our decision becomes simple; we apply the estoppel rule of New York, the only jurisdiction with an interest in having its law applied to the issue of defining ownership of the vehicle. We conclude that the District Court erred in directing a verdict in favor of Goldberger".

In the case at bar, the laws of Louisiana and of Wisconsin as to notice differ materially, but only Louisiana has even the remotest interest in having its law applied.

Louisiana Revised Statute 22:177[16] provides that no insurer shall declare lapsed any policy for non-payment of premium, installment, loan or interest unless a written notice

16. See footnote 15, supra.

stating "the amount of such premium, installment, loan or interest, or portion thereof due on such policy" is mailed to the insured at least 15 and not more than 45 days prior to the date when payable. Louisiana's interest in enacting this statute was to protect the Louisiana insured against "losing his policy, through mere neglect to pay the premium, and also to give him a fair chance to meet the payments when due". *Boring v. Louisiana State Insurance Co.*, 154 La. 549, 97 So. 856 (1923). The statute embodies a state policy of Louisiana against forfeiture by its citizens of insurance benefits without notice.

Wisconsin has no such notice statute and on its face this may be to protect and promote the insurance industry of that state by relieving insurers of the burden of mandatory notice. Appellant does business in Louisiana and Wisconsin and all other states with its home office being in Hartford, Connecticut (footnote 1, supra). Wisconsin has no interest in relieving appellant, a non-domiciliary insurance company, of the burden of giving notice in Louisiana to a Louisiana citizen that his premium to be paid in Louisiana is due. Wisconsin's only contact with this case occurred and ended long ago in the single, fortuitous event of delivery of the insurance policy in that state. Wisconsin's policy — assuming it has such a policy — of protecting its own domicilary insurers against mandatory notice requirements would be neither furthered nor impinged upon by application of Louisiana law in this case.

On the other hand, the very purpose for which Louisiana enacted the notice statute is applicable here. Both the insured, Lester, Sr., and the appellee-beneficiary, Lester, Jr., were residents of Louisiana. As we have noted also, the insured has twice changed beneficiaries and obtained a loan from Aetna

in Louisiana. Louisiana's interest in protecting its citizens against forfeiture without notice is clearly very much at stake. We conclude that only if appellant had been a domiciliary of Wisconsin would a "true" conflict of interest exist. We find no conflict of laws. Appellant is bound by the Louisiana notice statute.

We next turn to the sufficiency of notice contention urged by Aetna. As did the district court, we conclude that appellant failed to give sufficient notice of lapse pursuant to La. R. S. 22:177. In reaching this decision we follow the determination reached by the district court.[17] So as not unduly to extend this already long opinion, we will not undertake to restate that court's views. Nevertheless, we adopt them without reservation.

Lastly, we consider appellee's contention on cross-appeal concerning the district court's failure to impose penalties and attorneys' fees. Appellee concedes on brief that there is no Louisiana law which supports an award of penalties and attorneys' fees in this case. We note appellee's argument that it is unfair for him to have to pay an attorney to represent him in his efforts to recover insurance proceeds which are legally his property, but point out that we are without power to legislate a remedy where the Louisiana Legislature has failed to provide one. Under *Erie* we apply the state substantive law as we find it.

As to both the appeal and the cross-appeal we therefore affirm the judgment of the district court. Costs shall be taxed against the appellant, Aetna.

AFFIRMED.

17. See 295 F. Supp. 1208, at 1214-1216.

OPINION OF THE COURT OF APPEALS ON REHEARING

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27539

DON E. LESTER, JR.,
Plaintiff-Appellee-Cross Appellant,

versus

AETNA LIFE INSURANCE COMPANY,
Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 28, 1970, 5 Cir., 1970, 433 F. 2d 884).

(December 11, 1970)

Before AINSWORTH, DYER and SIMPSON,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

JUDGMENT OF THE COURT OF APPEALS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27539

D. C. Docket No. CA 9836

DON E. LESTER, JR.,

Plaintiff-Appellee-Cross Appellant,

versus

AETNA LIFE INSURANCE COMPANY,

Defendant-Appellant-Cross Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before AINSWORTH, DYER and SIMPSON,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendant-appellant-cross appellee pay to plaintiff-appellee-cross appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 28, 1970

Issued as Mandate:

APPENDIX C

256 La. 289, 236 So. 2d 216

BESSIE JOHNSON

v.

ST. PAUL MERCURY INSURANCE COMPANY et al.

No. 49732.

Supreme Court of Louisiana.

March 30, 1970.

Rehearing Denied May 4, 1970.

SUMMERS, Justice.

This tort claim arises out of an automobile accident which occurred on June 11, 1966 in Beebe, Arkansas. On that day Bessie Johnson left Shreveport, Louisiana, as a guest of Harley D. DeMoss in his automobile en route to Waterloo, Iowa, to visit DeMoss' daughter. Bessie Johnson and DeMoss were residents of and domiciled in Shreveport where they intended to return after their visit to Iowa. The automobile owned by DeMoss was garaged at his home in Shreveport, licensed in Louisiana and insured for public liability under a Louisiana contract.

When the parties arrived in the town of Beebe, Arkansas, DeMoss ran into the rear end of an automobile owned by Leon Rutledge of Newport, Arkansas. At the time the automobile was being driven by Rutledge's eighteen year old son. As a result of the collision Bessie Johnson suffered personal injuries and incurred medical expenses. She filed this suit in Caddo Parish, Louisiana, against DeMoss and his public liability insurer, St. Paul Mercury Insurance Company.

Arkansas has a guest statute which requires a showing of wilful negligence on the part of the host before recovery can be had by a guest. The statute reads:

> Action by guest prohibited except in case of wilful negligence.—No person transported as a guest in any automotive vehicle upon the public highways or in aircraft being flown in the air, or while upon the ground, shall have a cause of action against the owner or operator of such vehicle, or aircraft, for damage on account of any injury, death or loss occasioned by the operation of such automotive vehicle or aircraft unless such vehicle or aircraft was wilfully and wantonly operated in disregard of the rights of the others. Ark. Stat. Ann., § 75-913.

Louisiana, on the other hand, has no guest statute. Ordinary negligence on the part of the host will warrant recovery by a guest. La. Civil Code art. 2315.

Plaintiff's petition does not charge that DeMoss wilfully and wantonly operated his automobile in disregard of the rights of others, but the petition does charge DeMoss with acts

of simple or ordinary negligence. DeMoss denied his negligence and, alternatively, urged the Arkansas Guest Statute in bar of plaintiff's right to recovery. This latter defense was sustained by the trial court. On appeal to the Second Circuit the judgment was reversed. 218 So. 2d 375. We issued certiorari on defendant's application. 253 La. 872, 220 So. 2d 457.

The trial court's decision was based upon the theory that the law of Arkansas applied to this tort because the situs of the accident was Arkansas. In adhering to the *lex loci delicti* doctrine which has prevailed in this State, the Court applied the guest statute of Arkansas denying recovery to plaintiff. The Court of Appeal, however, discarded the *lex loci delicti* doctrine and adopted what appears to be a "minimum contacts" theory for the solution of the case. Accordingly, it applied the substantive law of Louisiana whereby the ordinary negligence of DeMoss was sufficient to warrant recovery by the guest passenger. See La. Civil Code art. 2315.

As we understand the case at this point, DeMoss' ordinary negligence is conceded. The principal issue we must resolve is whether to apply the law of Arkansas or Louisiana to what is conceded to be an Arkansas tort.

So far as we can ascertain, this is the first case in the history of the jurisprudence of this State in which a Louisiana court has applied Louisiana law to a foreign tort; this, in spite of urgings to the contrary. Fry v. Lamb Rental Tools, 275 F. Supp. 283 (W.D. La. 1967); Doty v. Central Mutual Insurance Company, 186 So. 2d 328 (La. App. 1966); Blanchard v. Blanchard, 180 So. 2d 564 (La. App. 1965) concurring opinion

of Judge Tate. What is unique here is that this departure from the settled jurisprudence should be undertaken by an intermediate court. The action involves, at least, a failure by the Second Circuit to recognize its obligation to follow the settled law of this State. For, since the question is not regulated by statute, the law is what this Court has announced it to be.

The 1900 case of Williams v. Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851, recognized the transitory nature of tort claims and the then established principle universally observed in the United States that in tort cases the law of the place of wrong or where the right accrued governed (*lex loci delicti*). In Matney v. Blue Ribbon, 202 La. 505, 510, 12 So. 2d 253, 255 (1943), the proposition was again cogently stated by this Court in these words:

> At the outset, it is well to note that an action in tort is transitory in its nature and may be brought in any jurisdiction in which the wrongdoer is found. * * * It is also firmly imbedded in the jurisprudence of this country that all matters relating to the right of action in tort are governed by the *lex loci delicti,* or the place where the wrong was committed.

Again in Burke v. Massachusetts Bonding & Ins. Co., 209 La. 495, 499, 24 So. 2d 875, 876 (1946), the rule was approved in these words:

> Where the action is brought in one jurisdiction for a tort committed in another the rights and liabilities of the parties are determined by the laws of the place where the wrong is committed and not by the laws of the place where the right of action is asserted.

The rule thus so clearly established and reiterated by this Court has on repeated occasions been followed by the intermediate appellate courts of this State. In several of these cases we have refused certiorari. Sanders v. Atlas Assur. Corp., 156 So. 2d 245 (La. App. 1963), cert. denied, 245 La. 461, 158 So. 2d 612 (1963); Honeycutt v. Indiana Lumbermen's Mut. Ins. Co., 130 So. 2d 770 (La. App. 1961), cert. denied; Watkins v. Cupit, 130 So. 2d 720 (La. App. 1961); Blount v. Blount, 125 So. 2d 66 (La. App. 1961), cert. denied; Smith v. Northern Ins. Co. of N. Y., 120 So. 2d 309 (La. App. 1960), cert. denied; Mondello v. Pastiro, 78 So. 2d 64 (La. App. 1955); Cone v. Smith, 76 So. 2d 46 (La. App. 1955), cert. denied; Mock v. Maryland Casualty Co., 6 So. 2d 199 (La. App. 1942); Polmer v. Polmer, 181 So. 200 (La. App. 1938); Surgan v. Parker, 181 So. 86 (La. App. 1938). The federal courts of this State have likewise correctly applied the doctrine of *lex loci delicti* in their adjudications involving foreign torts. Fry v. Lamb Rental Tools, Inc., 275 F. Supp. 283 (W.D. La. 1967); Totty v. Travelers Insurance Company and J. D. Snee, 200 F. Supp. 34 (E.D. La. 1961); Hale v. American Fire and Casualty Company, 81 F. Supp. 273 (W.D. La. 1948).

So well established has the rule of law become that in many of the cited cases the principle is conceded by both parties. The rule has had the beneficial effect of certainty and simplicity of application and has done much to promote the expeditious disposition of cases where the problem is presented.

[1] Fundamental and elementary principles recognize that certainty and constancy of the law are indispensable to

orderly social intercourse, a sound economic climate and a stable government. Certainty is a supreme value in the civil law system to which we are heirs. Merryman, The Civil Law Tradition 50 (1969). In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of *jurisprudence constante*. Unlike *stare decisis*, this latter doctrine does not contemplate adherance to a principle of law announced and applied on a single occasion in the past.

However, when, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of *jurisprudence constante;* and the rule of law upon which they are based is entitled to great weight in subsequent decisions. Keller v. Haas, 209 La. 343, 24 So. 2d 610 (1946); Gravier v. Gravier, 200 La. 775, 8 So. 2d 697 (1942); Miami Corp. v. State, 186 La. 784, 173 So. 315 (1937); Rubin and Ponder, The Ostrich and the Arbitrator: The Use of Precedent in Arbitration of Labor-Management Disputes, 13 La. L. Rev. 208 (1953).

Thus, while this court has the power to modify and overrule its former decisions, it does not do so unless it is clearly demonstrated that error has occurred and hardship and injustice will attend a continuation of the rule of law. Gravier v. Gravier, *supra*.

Les loci delicti has been uniformly applied in this State on at least three occasions by this Court, ten times by the intermediate appellate courts and in not less than three reported decisions in the Federal District Courts. A rule of law so firmly

established should not be abandoned without some compelling reason.

Asserting that the Louisiana courts have never been urged to abandon the *lex loci* doctrine, plaintiff advocates its abolition now. In its place plaintiff would have this Court substitute the "grouping of contacts" theory of liability in tort cases announced in Babcock v. Jackson, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279 (1963), or the related theory incorporated in the Restatement (Second) of Conflict of Laws. In Babcock the Court noted that "the mechanical formula of the conflicts of law" had been abandoned in contract cases and decided:

> The "center of gravity" or "grouping of contacts" doctrine adopted by this court in conflicts cases involving contracts impresses us as likewise affording the appropriate approach for accommodating the competing interests in tort cases with multi-State contacts. Justice, fairness and "the best practical result" (Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 141, 191 N.E. 2d 992, 995, supra * * *) may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation. 12 N.Y. 2d at 481, 240 N.Y.S. 2d at 749, 191 N.E. 2d at 283.

In the Restatement the rule is stated as follows:

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law

> of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6. Restatement (Second) of Conflict of Laws § 145 (Proposed Official Draft Part II, 1968).

Obviously the rules thus enunciated are anything but clear. Terms such as "center of gravity," "grouping of contacts," "most significant relationship," "contacts" and "interests" do little to serve as a guide or to establish a rule of law which may be applied with any degree of certainty. The idea, however, has gained attention and some support. See Weintraub, Revolution in the Choice of Law for Torts, 51 A.B.A.J. 441 (1965); Symposium (by leading conflict of law scholars), Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1212 (1963); Ehrenzweig, The Most Significant Relationship in the Conflicts Law of Torts, 28 Law and Contemp. Prob. 700 (1963); Reese, Conflict of Laws and the Restatement Second, 28 Law and Contemp. Prob. 679 (1963); Rheinstein, The Place of Wrong: A Study in the Method of Case Law, 19 Tul. L. Rev. 4 (Part 1), 165 (Part 2) (1944); Comment, Conflict of Laws in Louisiana: Tort, 39 Tul. L. Rev. 96 (1964).

In addition to the varying pronouncements found in court decisions since the late fifties, when the first departure from *lex loci* occurred, Emery v. Emery, 45 Cal. 2d 421, 289 P. 2d 218 (1955); Koplik v. C. P. Trucking Corp. 27 N.J. 1, 141 A. 2d 34 (1958) and Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W. 2d 814 (1959), four theories have been suggested by commentators in recent years for the solu-

tion of conflict of tort law cases.[1] These solutions are Morris' "proper law",[2] Currie's "governmental interest",[3] the Second Restatement's "most significant relationship,"[4] and Ehrenzweig's "place where the car is (permanently) garaged."[5]

The "proper law" theory of Morris, in effect, suggests that the existing *lex loci delicti* rule applied to all conflict of tort law cases does not always lead to "socially desirable results". Morris suggests that the search for the proper law involves a "sophisticated inquiry into problems of causation and foreseeability coupled with a balancing of the interest of the states whose law is involved." The suggestion is that each case be decided on an ad hoc basis as the judge deems "proper". Morris' "proper law" theory promotes an unlimited judicial discretion which negates the notion of laws.

The Restatement (Second) states its suggested new rule for cases of conflict of laws in tort in these words:

> Section 145. The General Principle.
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most

1. Baer, Two Approaches to Guest Statutes in the Conflict of Laws; Mechanical Jurisprudence Versus Grouping of Contacts, 16 Buffalo L. Rev. 537 (1967).
2. Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881 (1951).
3. Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9 (1958).
4. Restatement (Second) of Conflict of Laws § 145. (Proposed Official Draft Part II, 1968).
5. Ehrenzweig, Conflict of Laws, at 580 (1962). See also Ehrenzweig, Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability under Foreseeable and Insurable Laws, 69 Yale L. J. 595 (1960).

significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

A close study of the Restatement (Second) notes to this rule leads irresistibly to the conclusion that it gives no rule at all. In the words of Baer:

> It does no more than list a few well known contacts and some factors which it feels the courts should consider. It ties all these together by admonishing the court to apply the law of the state which has the most significant relationship with the occurrence and the parties, but seems to recognize that this will be any law that the courts decide to pick. Baer, *supra* n. 1, at 573.

Currie's "governmental interest" analysis unlike Morris' "proper law" and the Second Restatement's "most significant relationship" is not confined to tort law. It is a general approach to all choice of law problems which few, if any, of the commentators would embrace wholeheartedly. Currie's theory suggests that the law of the forum be applied as a matter of course and:

> (W)hen a court is asked to apply the law of a foreign state different from the law of the forum, it should enquire into the policies expressed in the respective laws, *and into the circumstances in which it is reasonable for the respective states to assert an interest* in the application of these policies. In making these determinations the court should employ the ordinary process of construction and interpretation. (Emphasis added.) Currie, Comments on Babcock v. Jackson at 1242.

What this theory will lead to in its application is a dogma that states can and do have a logical, rational and legitimate interest only in their own residents. A provincialism repugnant to our federalism would be sure to follow in this field of law under Currie's rules. A state whose conflict of laws rule always serves its own citizens can hardly expect its citizens in the courts of another state to receive any treatment which is inimical to the citizens of that state.

The solution in guest statute cases for Ehrenzweig must be found by considering the interest of the parties in the light of forum policy. This is primarily the interest of the host in

procuring liability insurance adequate under the law and the insurer's interest in the calculability of the premium. Thus he would apply the law of the state where the car is garaged, a law which can be anticipated by all concerned.

[2] Existence of liability insurance ought not to create a cause of action where none exists otherwise. A policy of insurance protects against claims legally asserted, but does not itself produce liability. Prince v. Prince, 205 Tenn. 451, 326 S.W. 2d 908 (1959). Nothing about Ehrenzweig's proposal escapes the criticism aimed at *lex doci delicti*: that it is too rigid and does not provide the flexibility required to meet the justice of each particular case. Ehrenzweig simply substitutes one inflexible rule for another.

The Babcock Court, Morris, the Second Restatement and Currie in their efforts to formulate a rule to take care of all choices of tort law cases, to promote certainty in the law and provide for the justice of the individual case, have devised rules which permit the courts to reach whatever result it wishes. Such rules are in effect no rules at all.

The Babcock doctrine is vague and ill-defined at best—leading to confusion, and at worst manifestly dangerous because it opens wide the door to decisions based on whim or caprice, with after-the-fact fabrication of contact analysis offered for added weight and justification. Note, 20 Rutgers L. Rev. 572 (1966).

It has been predicted that the Babcock decision

> * * * will throw the law governing torts into a state of utter confusion, will bring forth a hodge podge of

> decisions based neither on rhyme nor reason, will breed uncertainties, will encourage forum shopping by the parties, will increase provincialism throughout this federalized country and will allow recovery solely that one might recover. Sparks, Babcock v. Jackson—A Practicing Attorney's Reflections Upon the Opinion and Its Implications, 31 Ins. C.J. 428 (1964).

Even within the same court, the Babcock decision has not led to uniform results as the decision in Dym v. Gordon, 16 N.Y. 2d 120, 262 N.Y.S. 2d 463, 209 N.E. 2d 792 (1965), illustrates. Dym may presage a turnabout. *See* Baer, *supra* n. 1.

[3] Of course a forum court is not constitutionally free to apply its own laws to every element of every tort case brought before it. Woodward v. Stewart, 243 A. 2d 917 (R.I. 1968); Leflar, Constitutional Limits on Free Choice of Law, 28 Law and Contemp. Prob. 706 (1963). In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out of state event. Pearson v. Northeast Airlines, Inc., 309 F. 2d 553 at 563 (2nd Cir. 1962).

And the Full Faith and Credit Clause places a restraint upon this proposed judicial law making, which, when considered with the concept of comity between states as intimately associated as Louisiana and Arkansas, makes us pause and hesitate to embrace this somewhat fashionable but free-wheeling tendency. U.S. Const. art. IV, § 1; The Federalist No. 42; Pearson v. Northeast Airlines, Inc., *supra* at 567; John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 57 S. Ct. 129, 81 L.Ed.

106 (1936); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 at 202 (1918); Restatement of Conflict of Laws §§ 384, 391; 16 Am. Jur. 2d Conflict of Laws § 7; 21 C. J.S. Courts § 545.

[4, 5] Essentially, plaintiff cannot recover in tort unless he has been given by some law a cause of action in tort; and this cause of action can be given only by the law of the place where the tort is committed. That is the place where the injurious event occurs, and the law of that place applies. 2 Beale, Conflict of Laws § 378.1 (1935). For a court to apply its law to events occurring outside its territory is to give them extraterritorial effect. Refusing to apply the law of the place where a tort occurred in deciding a case and insisting on applying the forum law to the foreign event is to give extra-territorial effect to a state's laws. A court might just as well apply a set of facts other than the true facts in the decision of a tort case as to apply a law to the events other than the law of the place where the events occurred. The effect is the same. Story, Conflict of Laws § 38 (8th ed. 1883).

Adoption of the contact doctrines with their attendant built-in inclination to favor the plaintiff, combined with the known fact that plaintiff selects the forum, the assumption is all too clear that plaintiff will select the forum which benefits his claim, as in the case at bar. This places the defendant in an unequal position in the eyes of the law denying him the equal protection of the law. Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1948); Dym v. Gordon, 16 N.Y. 2d 120, 262 N.Y.S. 2d 463, 209 N.E. 2d 792 (1965).

Nor do we feel that scholarly or judicial repugnance to guest statutes in itself will warrant an excursion into a nebulous field where in complex situations each decision will call for an unstable exercise in legal gymnastics. Wessling v. Paris, 417 S.W. 2d 259 (Ky. 1967). Our research reveals that more than half of the states have guest statutes; and they are supported by policies which those states in the exercise of a proper legislative function deemed worthy to support those enactments.

For instance, in Arkansas the statute under consideration has been defended against an attack that it denied access of an injured guest to the courts for injuries sustained at the hands of a host who was only guilty of ordinary negligence. In Roberson v. Roberson, 193 Ark. 669, 101 S.W. 2d 961 (1937), the Supreme Court of Arkansas analyzed the act and concluded that it defined the care due the guest and prescribed the character of proof the guest must make to sustain his action for injury done. Put another way, the Arkansas guest statute fixes the measure of care the host owes the guest. In effect it fixes the reciprocal rights and duties of the host-guest relationship of those who use the highways of Arkansas, a matter clearly within its legislature's prerogative to regulate.

In the Babcock case the Ontario guest statute was said to be designed to protect insurance companies against fraudulent claims brought about by collusion between the guest and host. Babcock v. Jackson, *supra*, 240 N.Y.S. 2d at 750, 191 N.E. 2d at 284. Colorado's policy underlying its guest statute is threefold: the protection of Colorado drivers and their insurance carriers against fraudulent claims, the prevention of suits

by "ungrateful guests," and the priority of injured parties in other cars in the assets of the negligent defendant. Dym v. Gordon, 16 N.Y. 2d 120, 262 N.Y.S. 2d 463, 209 N.E. 2d 792 (1965). *See also* Birmelin v. Gist, 162 Ohio St. 98, 120 N.E. 2d 711 (1954); Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E. 2d 87 (1949).

We have not inquired into the policies which underlie all guest statutes, and we need not. It is sufficient that we know that some legitimate policies underlie their enactment. It is contrary to the established process of law reform, therefore, for courts to devise new and untried rules to circumvent these legislative enactments. It is doubtful that the courts can more wisely legislate in this matter than the legislatures of half of the States of the Union.

Other than the certainty which characterizes the *lex loci* rule; its simplicity and ease of application; its adherence to the clear import of the Due Process and Full Faith and Credit Clauses of the Federal Constitution; its regard for the principles of comity so important to a workable federalism, and the restraint it imposes upon states in the extraterritorial application of their laws; we recognize the added advantage Paul Henrich Neuhaus attributes to the rule:

> * * * (T)he economy of the process of adjudication dictates that the great volume of civil cases be decided according to clear-cut rules without a judicial repetition of the frequently quite involved legislative thought processes; this precludes a weighing of all possible relevant interests * * *. Neuhaus, Legal Cer-

tainty Versus Equity in the Conflict of Laws, 28 Law and Contemp. Prob. 795, 805 (1963).

Plaintiff advocates a course here which takes us away from the "clear-cut" rules of *lex loci* and compels acceptance of a doctrine not clearly defined in any respect. Such a change will involve this court in a legislative thought process in each case presented hereafter compelling the court to weigh all relevant interests in each fact situation and devise a rule for the solution of the case.

To make this departure from our settled law we must undertake a threefold process: First, the court must perceive the relevant social policies involved in the change; second, we must develop a rule to replace the rule plaintiff would have us abandon, and the new rule must give adequate and clear expression to the policies involved; and, third, the rule so formulated must be applicable to specific situations. In its present state, the "center of gravity", "grouping of contacts" or related doctrines are in their formative stages and will not lend themselves to a sound declaration of new law.

Other than broad and vague generalizations that changing times, the speed of travel and the need to do justice in the individual case require a departure from *lex loci,* no compelling reasons have been advanced to support a departure from *lex loci.* We take it that the prime objective of the proponents of change is to do justice in the individual case.

> Justice naturally is a value which all judges seek and undoubtedly forms the basis of many a decision. * * * But by and large, justice is a slender and treach-

> erous reed. Probably few judges, if any, are sufficiently Solomon-like to know what are the dictates of true justice in the majority of cases. Also justice in the individual case, if it were the one and only value, would be totally disruptive of all rules. And we may have need for such rules, not only as a basis for deciding cases, but also as standards upon which persons can plan their transactions and order their lives. Cheatham and Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959 (1952).

See also Sumner, Choice of Law Rules: Deceased or Revived? 7 U.C.L.A. Law Rev. 1 (1960).

Other states, when presented with this problem, have rejected adoption of the "contacts" theories and favored retention of *lex loci*, their traditional rule of law. *See* Landers v. Landers, 153 Conn. 303, 216 A. 2d 183 (1966); White v. King, 244 Md. 348, 223 A. 2d 763 (1966); Friday v. Smoot, 211 A. 2d 594 (Del. 1965); Shaw v. Lee, 258 N.C. 609, 129 S.E. 2d 288 (1963).

We are not satisfied that the abolition of *lex loci* is warranted. Accordingly, the judgment of the Court of Appeal is reversed and the judgment of the trial court is reinstated and made the judgment of this Court.

SANDERS, Justice (dissenting).

This conflict of laws litigation presents a crossroad decision for this Court: whether to retain the mechanical rule that the law of the place of the tort governs liability arising from tortious conduct irrespective of the circumstances. The

majority has elected to retain it. For reasons especially cogent in the present case, I disagree.

The plaintiff, Bessie Johnson, and the insured, Harley D. DeMoss, are residents of Shreveport, Louisiana. DeMoss owned an automobile, which was licensed, garaged, and insured in Louisiana. While a guest passenger on a trip to Iowa, Bessie Johnson sustained injuries when DeMoss ran into the rear of another vehicle in Arkansas. She filed suit in Louisiana against DeMoss and his insurer for damages.

Arkansas law denies recovery, because a guest statute requires that the vehicle be wilfully and wantonly operated in disregard of the rights of others. Ark. Stat. Ann. Sec. 75-913. Louisiana law grants recovery, because it requires only fault or negligence. LSA-C.C. Art. 2315.

The question presented is whether the Louisiana courts should apply Louisiana law or Arkansas law to the issue of the host's liability to his guest.

The place-of-tort is a judicial rule in Louisiana. It was imported into our Court decisions after the turn of the century. It forms no part of our codes or statutes. Hence, in a strict sense, it is not law, for law is a formal expression of legislative will. LSA-C.C. Art. 1.

In recent years, numerous authorities have conclusively demonstrated that the inflexible rule is unsound. It fails to take into account legitimate governmental interests and the ideals of justice of the forum state. It relies solely upon a circumstance that is purely fortuitous in automobile accident cases: the place of the accident. See, e. g., Leflar, American

Conflicts Law, §§ 133-136, pp. 323-333 (1968); Ehrenzweig on Conflict of Laws, § 211, pp. 541-548 (1962); Rheinstein, The Place of Wrong: A study in the Method of Case Law, 19 Tul. L. Rev. 4 (part 1), 165 (part 2) (1944); Comment, Conflict of Laws in Louisiana: Tort, 39 Tul. L. Rev. 96 (1964); Reese, Conflict of Laws and the Restatement Second, 28 Law and Contemporary Problems 679 (1963). Weintraub, Revolution in the Choice of Law for Torts, 51 Am. Bar Assn. Journ. 441 (1965); Currie, Selected Essays on the Conflict of Laws, pp. 165, 183, 188 (1963); Dainow, Conflict of Laws, 25 La. L. Rev. 387-390 (1965).

Several jurisdictions have circumvented the rule by characterizing such actions as being other than tort, based upon some aspect of the case. See, e. g., Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163, 61 A.L.R. 846; Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W. 2d 814. See also Leflar, American Conflicts Law, supra, § 133, pp. 323-325.

Most courts that have considered the question in recent years have abandoned the place-of-tort as an invariable rule. Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L.Ed. 1254 (1953); Tramontana v. S. A. Empresa De Viacao Aerea Rio Crandense, 121 U.S. App. D.C. 338, 350 F. 2d 468 (1965), cert. denied, 383 U.S. 943, 86 S. Ct. 1195, 16 L.Ed. 2d 206 (1966); Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P. 2d 727 (1967); Emery v. Emery, 45 Cal. 2d 421, 289 P. 2d 218 (1955); Wessling v. Parish, 417 S.W. 2d 259 (Ky. 1967); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W. 2d 365 (1957); Clark v. Clark, 107 N.H. 351, 222 A.

2d 205 (1966); Wilson v. Faull, 27 N.J. 105, 141 A. 2d 768 (1958); Babcock v. Jackson, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279, 95 A.L.R. 2d 1 (1963); Casey v. Manson Constr. & Eng'r. Co., 247 Or. 274, 428 P. 2d 898 (1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A. 2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W. 2d 408 (1965); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W. 2d 664 (1967); Mitchell v. Craft (Miss.), '11 So. 2d 509 (1968).

On the issue of guest statute application, recent decisions have, with only two exceptions, rejected the rule of place-of-tort. Babcock v. Jackson, supra; Clark v. Clark, supra; Wilcox v. Wilcox, supra; Heath v. Zellmer, supra; Witherspoon v. Salm (Indiana App.), 237 N.E. 2d 116 (1968); Mullane v. Stavola, 101 N.J. Super. 184, 243 A. 2d 842 (1968); Dubois v. Siewert, 293 N.Y.S. 2d 802 (1968); Woodward v. Stewart, (Rhode Island) 243 A. 2d 917 (1968); Fuerste v. Bemis (Iowa), 156 N.W. 2d 831 (1968); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W. 2d 526 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A. 2d 625 (1967); Kuchinic v. McCrory, 422 Pa. 620, 222 A. 2d 897 (1966); Macey v. Rozbicki, 18 N.Y. 2d 289, 274 N.Y.S. 2d 591, 221 N.E. 2d 380 (1966); Tooker v. Lopez, 24 N.Y. 2d 569, 301 N.Y.S. 2d 519, 249, N.E. 2d 394 (1969); Kennedy v. Dixon (Missouri), 439 S.W. 2d 173 (1969). Contra, White v. King, 244 Md. 348, 223 A. 2d 763 (1966); Friday v. Smoot (Delaware), 211 A. 2d 594 (1965).[1]

1. The majority speculates that the decision in Dym v. Gordon, 16 N.Y. 2d 120, 262 N.Y.S. 2d 463, 209 N.E. 2d 792 (1963) may presage a "turnabout" from Babcock v. Jackson, supra. Quite to the con-

Despite the foregoing jurisprudence, the majority has based the choice of law here upon the archaic rule. In my opinion, the choice of law should be based on something more substantial. The conflict of law authorities have clearly identified the relevant considerations. Cheatham and Reese, Choice of the Applicable Law, 52 Col. L. Rev. 959 (1952); Yntema, The Objectives of Private International Law, 35 Can. Bar Rev. 721, 734-735 (1957); Cavers, The Choice-of-Law Process, 139-203 (1965); Restatement of Conflict of Laws (Second), Section 6. They may be summarized as predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law. Clark v. Clark, supra; Mitchell v. Craft, supra; Leflar, American Conflicts Law, supra, § 105, p. 245.

Predictability of legal results in advance of an automobile accident is largely irrelevant. Automobile accidents are unplanned. The expectations of the parties as to liability, if they had any, would relate to the law of Louisiana, where the parties were domiciled, the automobile garaged, and the liability insurance policy issued.

Maintenance of interstate orderliness presents no problem here. The sensibilities of neither state will be affected by the choice of law. Interstate travel will also be unaffected.

If simplification of the court's task balances either way, it is on the side of Louisiana law. Courts of this state

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trary, Babcock was recently reaffirmed. See Macey v. Rozbicki, 18 N.Y. 2d 289, 274 N.Y.S. 2d 591, 221 N.E. 2d 380 (1966); Tooker v. Lopez, 24 N.Y. 2d 569, 301 N.Y.S. 2d 519, 249 N.E. 2d 394 (1969).

should be able to apply the fault concept of Article 2315 of the Louisiana Civil Code with greater ease and confidence.

Louisiana's governmental interest is paramount. Both the claimant and the insured are domiciled here. The automobile was garaged here. The public liability insurance was issued here. The trip was to begin and end here. Our state has a strong policy of protecting its citizens from loss by the fault of another. This principle is embodied in Article 2315 of the Louisiana Civil Code, providing:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[2]

Arkansas has little or no governmental interest in the damage claims of Louisiana residents against each other based on a host-guest relation. Unlike "rules of the road", the factors that bear on the host-guest relationship center in Louisiana.

The policy reflected in guest statutes is to protect hosts from ungrateful guests and to protect liability insurance companies from suits brought by guests in collusion with their hosts. Hence, under this policy, Arkansas is primarily concerned only with suits brought in its own courts affecting hosts, guests, and insurance companies subject to its jurisdiction. See Clark v. Clark, supra.

Finally, we are of the opinion that the Louisiana fault rule is superior to the wilful and wanton rule of the Arkansas

2. In substantially the same language, the principle was set forth in Louisiana's first Civil Code, as Article 16 of the Civil Code of 1808. Prior thereto, it was incorporated in the Code Napoleon (1804).

Guest Statute. The New Hampshire Supreme Court, speaking through Chief Justice Kenison in Clark v. Clark, supra, demonstrated this quite clearly:

> "The automobile guest statutes were enacted in about half the states, in the 1920's and early 1930's, as a result of vigorous pressures by skillful proponents. Legislative persuasion was largely in terms of guest relationships (hitchhikers) and uninsured personal liabilities that are no longer characteristic of our automotive society. Cavers, The Choice of Law Process 297 (1965). The problems of automobile accident law then were not what they are today. New Hampshire never succumbed to this persuasion. No American state has newly adopted a guest statute for many years. Courts of states which did adopt them are today construing them much more narrowly, evidencing their dissatisfaction with them. Pedrick, Taken for a Ride: The Automobile Guest and Assumption of Risk, 22 La. L. Rev. 90 (1961); Comment, the Ohio Guest Statute, 22 Ohio St. L. J. 629 (1961). Though still on the books, they contradict the spirit of the times. Leflar, Choice-Influencing Considerations on Conflicts Law, 41 N.Y.U. L. Rev. 267, 278, 307 (1966). Unless other considerations demand it, we should not go out of our way to enforce such a law of another state as against the better law of our own state. Weintraub, A Method for Solving Conflicts Problems: Torts, 48 Cornell L. Q. 215, 220 (1963)."

See also Heath v. Zellmer, supra.

In my opinion, we should abandon the place-of-tort as an invariable rule and place the choice of law on a sounder basis. The decision of this Court in Webb v. Zurich Insurance Company, 251 La. 558, 557 (n. 18) 205 So. 2d 398, 405 (n. 18) (1967) and that of the Third Circuit Court of Appeal in Universal C. I. T. Credit Corporation v. Hulett, 151 So. 2d 705 (1963) point the way to a new approach and a just result.

For the reasons assigned, I respectfully dissent.

SANDERS and BARHAM, JJ., are of the opinion a rehearing should be granted.

BARHAM, Justice, is of the further opinion that the Court of Appeal should not have been rebuked for its failure to follow "the settled law of this State". I commend it for its excellent discussion and adjudication thereunder of a Louisiana jurisprudentially created "conflicts" rule which has never been definitively analyzed by this court and which is in fact founded historically upon what was then the universal common law rule of our sister states. That jurisprudential foundation and source is now undergoing reexamination and determination in those common law states, and the prevailing trend is for the change in that rule advocated by the Court of Appeal.